FILED

(3)

No. 96-961394 MAR 3 1997

OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

(Pp. 209 – 435.)

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

RECEIVED
MAR - 4 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

March 3, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

231 PP

TABLE OF CONTENTS

APPENDIX A	Opinion and Order of the United States Court of Appeals for the Fifth Circuit (July 26, 1996)	1a-64a
APPENDIX B	Dissenting Opinion of Fifth Circuit Judge Jerry E. Smith (July 26, 1996)	65a-148a
APPENDIX C	Memorandum Opinion of the United States District Court for the Eastern District of Texas (July 27, 1995)	149a-208a
APPENDIX D	Findings of Fact of the United States District Court for the Eastern District of Texas (July 27, 1995)	209a-435a
APPENDIX E	Conclusions of Law of the United States District Court for the Eastern District of Texas (July 27, 1995)	436a-479a
APPENDIX F	Supplemental Conclusions of Law of the United States District Court for the Eastern District of Texas (July 27, 1995)	480a-487a
APPENDIX G	Judgment Approving Global Settlement of the United States District Court for the Eastern District of Texas (July 27, 1995) .	488a-503a

APPENDIX H — Judgment Regarding Class Certification of the United States District Court for the Eastern District of Texas (July 27, 1995) 504a-511a

APPENDIX I — Judgment on Attorney's Fees of the United States District Court for the Eastern District of Texas (Aug. 29, 1995) 512a-514a

APPENDIX J — Order Provisionally Certifying Class for Settlement Purposes of the United States District Court for the Eastern District of Texas (Sept. 9, 1993) 515a-518a

APPENDIX K — Order Denying Suggestion for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit (Nov. 26, 1996) 519a-522a

APPENDIX L — Order Denying Application for Panel Rehearing of the United States Court of Appeals for the Fifth Circuit (Dec. 3, 1996) 523a-524a

APPENDIX M — Constitutional Provisions, Statute, and Rules Involved 525a-527a

APPENDIX N — Class Action Complaint (Sept. 9, 1993) 528a-542a

APPENDIX O — Motion for Leave to Intervene by Continental Casualty Co. and Pacific Indemnity Co. (Sept. 9, 1993) 543a-546a

APPENDIX P — Joint Motion for Provisional Class Certification (Sept. 9, 1993) 547a-551a

APPENDIX Q — Excerpts from Testimony of Fibreboard Counsel Stephen Snyder (Dec. 12, 1994) 552a-553a

APPENDIX R — Excerpts from Testimony of CNA Counsel Meyer Koplow (Jan. 9, 1995) 554a-556a

APPENDIX S — Excerpts from Testimony of Class Counsel Harry Wartnick (Dec. 13, 1994) 557a-558a

APPENDIX T — Trust Distribution Process from Global Settlement Agreement (Dec. 23, 1993) 559a-597a

APPENDIX U — Excerpt from Transcript of Sept. 9, 1993 Hearing of United States District Court for the Eastern District of Texas (Sept. 9, 1993) 598a-600a

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated, Plaintiffs	:	Civil Action No. 6:93cv526
v.	:	
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

FINDINGS OF FACT

July 27, 1995

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	HISTORY OF ASBESTOS LITIGATION	5
	A. General Background	5
	B. Fibreboard Background	14
III.	FIBREBOARD INSURANCE COVERAGE LITIGATION AND ATTENDANT RISKS	21
IV.	FIBREBOARD'S RESPONSE TO ASBESTOS LITIGATION	33
	A. The Fibreboard Structured Settlement Program	33
	B. The Fibreboard-Continental "Interim Agreement"	36
	C. Fibreboard-Pacific Negotiations and the Fibreboard-Pacific Agreements	39
	D. The Fibreboard Assignment Settlement Program and Related Litigation	42

V. HISTORY OF GLOBAL SETTLEMENT NEGOTIATIONS 50

A. Early Global Negotiations (1990-1992) .. 50
B. The Initial Ness Motley Agreement 62
C. Negotiations During 1993 63

1. Early 1993 to April 9, 1993 63
2. April 9, 1993 to August 9, 1993 .. 72
3. August 9, 1993 to August 27, 1993 83
4. August 27, 1993 to December 23, 1993 98

VI. KEY SETTLEMENT TERMS 103
A. The Global Settlement 103
B. The Third-Party Claimant Class Settlement 117
C. The Trilateral Settlement 123
D. The Longshore Settlement 125

VII. FUTURE CLAIMS AND VALUE PROJECTIONS AND THEIR IMPLICATIONS FOR THE THREE LITIGATION/SETTLEMENT SCENARIOS BEFORE THE COURT 126

VIII. COMPARISON OF GLOBAL AND TRILATERAL SETTLEMENTS 132

IX. ADDITIONAL FAIRNESS CONSIDERATIONS140
A. Operation of the Trust 140
B. Limitations on Claims Against the Trust . 145
C. Fibreboard's Contributions tothe Settlement and the Insurers' Insistence on "Total Peace"148

D. Changed Circumstances 152
E. Rule 23(b) 155

X. THE CLASSES AND CLASS REPRESENTATIVES 156
A. The Classes 156
B. The Class Representatives 157
1. Global Health ClaimantClass Representatives 157
2. Global Third-Party Claimant Class Representative 161
3. Longshore Defendant Class Representative 163

XI. ADEQUACY OF CLASS COUNSEL 164
A. Global Health Claimant Class Counsel .. 164
B. Global Third-Party Claimant Class Counsel 168
C. Longshore Defendant Class Counsel 168

XII. ETHICAL CONSIDERATIONS 168

A. Alleged Conflict of Interest Between Present and Future Claimants 173

1. Time Period (i): Early 1991 Through April 9, 1993 176
2. Time Period (ii): April 9, 1993 Through August 9, 1993 177
3. Time Period (iii): August 9, 1993 Through August 27, 1993 184

4. Time Period (iv): August 27, 1993 Through October 12, 1993 190
5. Time Period (v): October 12, 1993 Through December 23, 1993 191
6. Conflict of Interest: Concluding Findings 192

B. Alleged Intraclass Conflicts 194
1. Alleged Conflict Between Pre-1959 and Post-1959 Claimants 196
2. Alleged Conflict Based on "Cognizability" of Injury 200
3. Alleged Conflict Based on Representation by SCB Member . 204

C. This Court's Consent 209
D. Fees 213

XIII. GUARDIAN AD LITEM 215

XIV. LONGSHORE SETTLEMENT 229

XV. ADEQUACY OF NOTICE 240

FINDINGS OF FACT

The Court makes the following preliminary findings of fact:[1]

I. INTRODUCTION

1. This is a class action commenced in connection with a settlement of contested and threatened litigation pursuant to Fed. R. Civ. P. 23(b). The agreements now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. As detailed below, there has been nothing feigned or collusive about the negotiations that brought the parties to court. The disputes among the parties are real and, unless the settlement is approved, those disputes will continue. The controversies between the litigants are not moot. The disputes tendered for resolution are ripe and the parties have properly presented the requested adjudication of rights by this Court.

2. The principal parties to this litigation are the following:

-- Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William

---

[1]To the extent the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class").[2]

-- Fibreboard Corporation ("Fibreboard"), which manufactured and distributed asbestos-containing products from the 1920s until 1971. See Findings of Fact ¶ 24.

-- Continental Casualty Company ("Continental"), CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard. See Findings of Fact ¶ 37.

-- Pacific Indemnity Company ("Pacific"), which Fibreboard alleges issued it a general liability policy. See Findings of Fact ¶ 37. (Continental and Pacific are sometimes collectively referred to herein as the "Insurers.")

-- Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant

---

[2]The formal definition of the Global Health Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

class of third-party claimants (the "Global Third-Party Claimant Class").[3]

-- Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class").[4]

-- Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Interveors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement.

-- James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

3. Diversity of citizenship is present and is uncontested. Each class member alleges, in good faith,

---

[3]The formal definition of the Global Third-Party Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

[4]The formal definition of the Longshore Defendant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

entitlement to damages in excess of $50,000, exclusive of interest and costs. This Court has subject matter jurisdiction over these proceedings.

4. Each member of the Global Health Claimant Class alleges exposure to asbestos, a well-documented human carcinogen, and therefore an increased risk of contracting cancer. In re Joint Eastern and Southern District Asbestos Litigation ("Manville"), 129 B.R. 710, 739-40 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992); Tr. at 544.[5] A number of courts, including the trial court in the coverage litigation between Fibreboard and the Insurers, have found that exposure to asbestos causes injury at the cellular level.[6] See, e.g., Carlough v. Amchem Products, Inc., 834 F. Supp. 1437, 1454 (E.D. Pa. 1993). Accordingly, each member of the Global Health Claimant Class alleges injury-in-fact sufficient to confer standing.

5. Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, inter alia, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. The Court takes judicial notice that it is not at all uncommon that asbestos

---

[5]Citations to "Tr. at ___" are to the daily transcript of the fairness hearings conducted herein.

[6]In making this finding, however, the Court in no way finds that such cellular or subclinical injury is sufficient to constitute "bodily injury" within the meaning of insurance policies.

plaintiffs recover jury verdicts substantially in excess of $50,000 notwithstanding the absence of disability or medical impairment, typically in pleural thickening cases. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 816 (Cal. 1993); Miranda v. Shell Oil Co., 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); Barras v. Monsanto Co., 831 S.W.2d 859 (Tex.App.- -Houston [14 Dist.] 1992, writ denied). Fibreboard's headquarters are located in California, Fibreboard Exh. 706, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

II. HISTORY OF ASBESTOS LITIGATION

A. General Background

6. Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Trial resulted in a verdict in favor of the defendants. Tr. at 60. It is generally accepted that the tide of asbestos-related injury litigation flooding the nation's courts today turned on the result in the Borel case, an action filed in the Beaumont Division of thisCourt in 1969. Tr. at 131. All Borel defendants, including Fibreboard, were held liable, and on appeal the Fifth Circuit

affirmed. Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

7. Following Borel, and through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified, the primary target being Johns-Manville, Inc. ("Manville"). Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. Tr. at 128, 131-32, 937-38; Fibreboard Exh. 102 at vii; Manville, supra, 129 B.R. at 743-45.

8. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically. Class Plaintiffs Exh. 1014; Tr. at 133; Manville, supra, 129 B.R. at 745-51; Class Plaintiffs Exh. 1014 (Transcript of Deposition of Lawrence Fitzpatrick, Feb. 22, 1994, Georgine v. Amchem Products, Inc., Civil Action No. 93- 215 (E.D. Pa.) ("Fitzpatrick Tr.")) at 72-76.

9. Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously considered to be immune fromfinancial difficulty. See In re Asbestos Products Liability Litigation, 771 F. Supp. 415, 420 (J.P.M.L. 1991). Beginning in 1982 with Unarco Industries, Inc. and Manville, the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation,

National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc. Fibreboard Exh. 919, Tab 4.

10. Before it entered bankruptcy, Manville, which had supplied the largest share of asbestos-containing products, basically controlled the defense of asbestos litigation na- tionwide. Fitzpatrick Tr. at 74. Manville paid on an aggregate basis approximately 30% to 33% of the funds paid in asbestos settlements. After Manville entered bankruptcy in 1982, and stopped paying money in asbestos cases, other asbestos defendants generally believed that they did not receive settlement credits or set-offs reflecting Manville's share. Tr. at 132-34, 1133-34; Fibreboard Exh. 100 at 5.

11. As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their claims resolved. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 7-12 (1991) (Class Plaintiffs Exh. 1003). Transaction costs outpaced compensation to victims. Id. at 12-14. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Fibreboard Exhs. 100-102.

12. Asbestos litigation constitutes "an unparalleled situation in American tort law." In re School Asbestos Liti- gation, 789 F.2d 996, 1000 (3d Cir.), cert. denied, 479 U.S. 852 (1986). Citing the Asbestos Ad Hoc Committee Report, the Judicial Panel for Multidistrict Litigation

summarized what it termed the "most objectionable aspect of asbestos litigation":

> dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

In re Asbestos Products Liability Litigation, supra, 771 F. Supp. at 419 (citing Asbestos Ad Hoc Committee Report at 1-3).

13. By 1986, counsel, commentators and courts began to recognize the enormous problems facing all involved in asbestos litigation. In 1987, the Federal Judicial Center convened a conference to discuss the asbestos litigation crisis and the need for some type of overarching resolution. The conference included judges with significant asbestos dockets across the country and some leading members of the asbestos plaintiffs' bar. Participants addressed many of the conditions outlined above, including the growing backlog of cases, the fact that new cases were being filed at a much greater rate than existing cases could be tried or settled, the fact that transaction costs greatly outweighed the victims' recoveries, and the growing number of bankrupt defendants. Fitzpatrick Tr. at 72-77. Despite the widespread recognition of these problems, the asbestos crisis continued to worsen. By 1990, overwhelmed asbestos courts had turned to novel mass adjudication techniques. Fibreboard Exhs. 104, 105, 107-117, 120-124.

14. In 1990, the Federal Judicial Center convened another conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. This took place at the Dolley Madison House in Washington, D.C. The 1990 Federal Judicial Center conference was a significant event in the history of asbestos-related litigation. Many of those involved, including counsel for Fibreboard, came away with a clear impression that "business as usual" would not be a judicially acceptable solution to the problem. Tr. at 211; Fitzpatrick Tr. at 82-84.

15. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps to- ward national action on the asbestos problem. A number of federal judges organized to explore class action treatment of the problem. Fitzpatrick Tr. at 84-86.

16. In July 1990, some leading members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed. R. Civ. P. 23(b)(1)(B), Linscomb v. Pittsburgh Corning Corp., et al. The action was commenced on behalf of all persons (present and future) with asbestos- related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Fibreboard Exh. 116. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be

found. Fitzpatrick Tr. at 87-89; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117.

17. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the MDL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23." Fibreboard Exh. 118; Fitzpatrick Tr. at 93-95.

18. In March 1991, the Asbestos Ad Hoc Committee issued its report. Class Plaintiffs Exh. 1003. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 265 (E.D. Pa. 1994). The Asbestos Ad Hoc Committee stated:

> [T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the

courts are ill-equipped to meet effectively. Asbestos Ad Hoc Committee Report at 2.

19. The Asbestos Ad Hoc Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. Id. at 14. It concluded, id. at 10, that:

The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases.

20. On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings.[7] In re Asbestos Products Liability Litigation, supra, 771 F. Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve

---

[7]In the hearing before the MDL Panel, the majority of the plaintiffs' bar had favored the Eastern District of Texas as the transferee forum in connection with the MDL proceedings, if there was to be a transfer of cases. Fitzpatrick Tr. at 95. It is a matter of common knowledge that asbestos claimants from across the country, and from outside the United States, frequently select courts in Texas -- and this District in particular -- as the venue in which to pursue their asbestos personal injury actions. The Court notes that substantial numbers of the most recent asbestos personal injury filings against Fibreboard in Texas by the Baron & Budd firm, counsel for the Ortiz Intervenors, were apparently on behalf of residents of states other than Texas. Fibreboard Exh. 824.

these asbestos matters fairly and with as little unnecessary expense as possible." Id. at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. Id. at 416, 421. Linscomb was transferred to Judge Weiner as part of the MDL proceedings.

21. After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder,[8] counsel for Fibreboard, as a member of the Defendants' Steering Committee. Judge Weiner made clear that he wanted the litigants to solve the asbestos crisis on a global basis. Tr. at 125; Fitzpatrick Tr. at 99-100, 110-11.

22. Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. Tr. at 221. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative

---

[8]Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Tr. at 118. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Tr. at 118. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases. Tr. at 120-23.

resolution mechanism for asbestos claims. Judge Weiner encouraged these global settlement negotiations. Fitzpatrick Tr. at 110-11. These talks did not result in a global settlement, Fitzpatrick Tr. at 114-17, but they did serve as a springboard for other, less inclusive negotiations, including those that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See Georgine, supra, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements. Tr. at 221.

23. At the time of the settlement negotiations un- derlying this class action, asbestos litigation was probably the most "mature" mass tort litigation in this country: i.e., the liability and medical issues pertinent to such litigation had been the subject of thorough and repeated discovery, trial and settlement. Georgine, supra, 157 F.R.D. at 321-22; F. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659 (1989). The results of this experience were known to counsel for the plaintiff class in this action, as well as to counsel for Fibreboard and, to some lesser extent, its insurers. Tr. at 937-38, 2162, 2720.

B. Fibreboard Background

24. As asbestos-related defendants were sued on a regular basis, Fibreboard became known as an "all-years" defendant because its asbestos-containing products had been distributed from the 1920s until 1971, when it ceased producing

asbestos-containing products. Tr. at 127-28. In contrast, some defendants are generally recognized to bear liability for exposure to asbestos that occurred only during certain periods of time. In addition, Fibreboard was and is considered to be primarily a "pipe and boiler" defendant, in that its products frequently were used in high-temperature industrial applications involving shipyards, boiler rooms, shops, refineries, and similar applications. Most other defendants were primarily manufacturers of asbestos-containing roofing products, construction materials and linoleum flooring. Tr. at 128. Fibreboard became known as a regional defendant because its primary manufacturing facilities and distribution networks during most of the relevant years were in California. Fibreboard had a primary exposure to liability in West Coast and Gulf Coast (especially Texas) cases, rather than in cases in the East. Tr. at 128, 131, 2448-49.

25. In 1983, Fibreboard suffered its first punitive damages verdict. Tr. at 118, 400. Nonetheless, perhaps be- cause there is no "treasure trove" of inculpatory Fibreboard documents, Tr. at 440, Fibreboard never became a punitive damages target defendant. Tr. at 400. With one exception, Fibreboard ultimately never paid a punitive damages judgment in connection with an asbestos personal injury claim. Tr. at 399; Fitzpatrick Tr. at 130.

26. Fibreboard generally experienced greater liability in cases of earlier exposure to asbestos than in cases of later exposure. That was because (i) Fibreboard had a greater share of the pipe and boiler insulation markets in the earlier years (i.e., before the mid-1950s) than in later years (i.e., the late 1950s and 1960s); (ii) the bankruptcy of other defendants with

Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending litigation. Tr. at 148-49. When it left the ACF, Fibreboard did not have enough cash to pay settlements of asbestos injury cases, Tr. at 153, and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF. Tr. at 149-50.

35. From before the time it entered the ACF in 1985, and to this day, Fibreboard's corporate goal was, and has been, to manage and resolve its asbestos liabilities within its available insurance resources. Tr. at 144.

III. FIBREBOARD INSURANCE COVERAGE LITIGATION AND ATTENDANT RISKS

36. Fibreboard's insurance coverage litigation, which came to be captioned In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), commenced in 1979 when Fireman's Fund Insurance Company filed a complaint in San Francisco County Superior Court against Fibreboard and others, including Continental and Pacific. Fibreboard Exh. 203. Fibreboard's other insurers later became parties to this litigation.

Fibreboard Exh. 204. In 1981, the action was coordinated with several separate asbestos coverage cases then pending in California. In 1983, Judge Ira A. Brown, Jr., was confirmed as coordination trial judge. Fibreboard Exhs. 205-207. Judge Brown ordered the parties to produce all relevant documents as part of a massive discovery effort. Fibreboard Exhs. 208, 209, 211.

37. Fibreboard alleged that Pacific insured it from 1956 to 1957 under a no-aggregate-limit policy, but was unable to locate a copy of the policy. Pacific denied that the policy had no aggregate limit. Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The premium for this policy was less than $10,000 per year. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit, and a $500,000 per claim limit. Fibreboard Exh. 201.

38. The Coverage Case was tried in several phases. The trial was one of the largest and most complex proceedings in the history of American civil jurisprudence, involving numerous insureds and insurers. Fibreboard Exh. 215 at 1340-42. Phase I involved the existence and terms of certain missing insurance policies, including the missing Pacific policy. Fibreboard was not involved in Phase II. Phase III involved the basic coverage provisions of the policies, including the trigger of coverage and scope of coverage. Phase IV involved multiple subphases, including Continental's "number of occurrences" issue, scope issues concerning whether the policy-holders should be required to contribute to claims costs, and the Insurers' contribution rights against each other. Fibreboard was not

> a percentage was determined for each producer as a total of all producers." Regarding "defense costs, the allocation was derived by taking each producer's number of pending claims, divided by the total number of pending claims for all producers combined."

29. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers -- but not with Continental or Pacific -- in order to enter the ACF. Tr. at 138. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

30. When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. Tr. at 144. During ACF operations (June 1985 to September 1988), its members enjoyed lower defense costs because the number of defense counsel serving ACF members in asbestos cases fell from as many as 1,200 law firms to approximately 65 firms. Tr. at 139; Fibreboard Exh. 102 at 31. Within the ACF, Fibreboard paid close to 13% of all settlements made on behalf of any member. Tr. at 140.

31. In the Western United States there was some success from Fibreboard's perspective in reducing filings of claims by "non-impaired" claimants, i.e., people with some exposure to asbestos who had no significant medical impairment or disability, and indemnity values in other types of cases were

kept within reasonable limits. This was accomplished by means of an expensive, labor-intensive litigation effort involving considerable trial activity. However, these results were not obtained elsewhere for Fibreboard within the ACF, and the filing of asbestos claims against Fibreboard in the Eastern United States and in Texas increased substantially during the ACF years. Tr. at 143-46. In the end, ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues.

32. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged. Tr. at 136-37, 2669-70, 2679-80.

33. Filings of new asbestos-related cases against Fibreboard in 1982 through 1984 were in the range of 4,500 to 5,000 cases per year. With rumors that the ACF might be established, and upon its advent in June 1985, filings of such cases increased to over 8,000 in 1985. In the remaining full years of the ACF -- 1986 and 1987 -- filings stayed at a high level, in the range of 13,000 to 17,000 cases per year. Tr. at 136.

34. When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Tr. at 148-49.

substantial liability exposures arising out of early years, such as Manville, Eagle-Picher and Celotex, had the greatest impact on defendants such as Fibreboard who also had liability for early-years exposures; (iii) Fibreboard can produce evidence that it began to give warnings with respect to the health hazards of its products in 1966; and (iv) cases arising out of early exposures, such as those in World War II shipyards, tended to be more serious. Tr. at 129-31.

27. Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on Manville to bear the brunt of the defense of cases. Tr. at 131. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary. Tr. at 131-32.

28. Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint representation in asbestos-related personal injury litigation. The general operation of the ACF (also known as the Wellington Facility, after Dean Wellington of the Yale University Law School, who assisted in the negotiations leading to its formation), is well known by the Court and is described in a number of judicial opinions. See, e.g., Unigard Security Insurance Company, Inc. v. North River

Insurance Co., 4 F.3d 1049, 1056 (2d Cir. 1993) (internal citations omitted):

> As a result of the massive liability for asbestos-related claims, the expense of litigation between producers and their insurers, and the administrative costs of managing nationwide litigation and claims, an agreement concerning asbestos-related claims, known as the Wellington Agreement, was signed by producers of asbestos and their insurers on June 19, 1985. . . . The Agreement established the Asbestos Claims Facility ("the Facility") to "administer and arrange for the evaluation, settlement, payment or defense of all asbestos-related claims against Subscribing Producers and Subscribing Insurers in accordance with the provisions of the Agreement. . . ." Moreover, as "sole agent, the Facility [had] exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos-related claims."
>
> Once the Facility settled a claim, the liability amount and the defense costs were allocated among the producers of asbestos . . . according to a producer-allocation formula. The producer-allocation formula was actually two formulae, one for indemnity (or to pay the annual claim) and one for defense costs. "To share indemnity, each producer's historical average cost by state was multiplied by that producer's pending claims in that state. And the product was summed and

involved in Phase V. Fibreboard Exh. 223. At stake for Fibreboard and the Insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

39. In March 1985, a jury in Phase I of the Coverage Case trial found that Pacific had issued a one-year comprehensive general liability policy to Fibreboard's predecessor in 1956. The jury also found, by a nine to three vote based on a preponderance of the evidence standard of proof, that the policy had a $500,000 per claim limit, but no aggregate limit. Tr. at 138; Fibreboard Exh. 223.

40. The Phase III issues, including the trigger and scope of coverage, were tried and argued to the court between September 1985 and February 1987. In May 1987, Judge Brown issued a tentative decision in Phase III of the Coverage Case in favor of the policyholders. Fibreboard Exh. 219. He found that a "continuous" trigger existed, which meant that policy coverage applied to any claim where the claimant had been exposed to any asbestos prior to the expiration date of the policy. He thus rejected an "exposure only" trigger, under which a policy would respond only to claims as to which exposure to asbestos occurred during the policy period, and like- wise rejected a "manifestation" trigger, under which a policy would respond only to claims as to which injury became apparent during the policy period. The Insurers had taken various positions on trigger of coverage in the trial court. Pacific took the manifestation position and Continental took no position. Fibreboard Exh. 200. Judge Brown further found that the scope of each triggered policy extended to full responsibility

for defense and indemnity on a claim within policy limits, and did not adopt a pro rata approach, which would have limited each insurer's responsibility to a proportion of the liability. In addition, Judge Brown's scope decision did not obligate the policyholder to contribute for uninsured or underinsured periods. Fibreboard Exh. 219.

41. The Phase IV issues, including the number of occurrences and reserved scope issues, were tried to the Court in the Fall of 1987. Among other issues, Continental asserted that its policy had a maximum limit of $2,000,000 for Fibreboard's asbestos bodily injury claims because of its $1,000,000 per occurrence limit. Continental urged that there were only two occurrences under the policy, contending that "occurrence" referred to the sources of Fibreboard's asbestos-containing products, and only two Fibreboard plants had manufactured such products. In August 1988, Judge Brown issued a tentative decision in Phase IV of the Coverage Case. Judge Brown rejected Continental's contentions on the number of "occurrences," holding instead that each claim constituted a separate occurrence. Judge Brown also tentatively ruled that each triggered policy is responsible for the full costs of a claim, with the right to seek contribution from other triggered policies. Fibreboard Exh. 220.

42. On January 24, 1990, the trial court rendered judgment in the Coverage Case. Fibreboard Exh. 223. the judgment incorporated the jury's findings as to the existence and terms of the Pacific policy. It incorporated in substance the "continuous trigger" and "scope" rulings set forth in the Phase III tentative decision, and the "occurrence" ruling set forth in the Phase IV decision. Fibreboard Exhs. 222, 223. Judge Brown

denied all motions for a new trial and for judgment notwithstanding the verdict. Fibreboard Exh. 224.

43. Insurers, including Continental and Pacific, appealed the trial court's decision in the Coverage Case, and the appeals were consolidated. The appellate record was extraordinarily voluminous. In November 1990, the California Court of Appeal issued an order calling for separate briefing by "issue groups." Appellate briefing took place between April and November 1991. Issue Group I included the Pacific missing policy issues. Pacific argued that the court should have instructed the jury that the burden of proof was by a "clear and convincing" standard rather than a "preponderance of the evidence" standard. Issue Group II addressed the basic coverage issues of the trigger and scope of coverage for asbestos bodily injury claims, as well as certain issues unique to Continental (the number of "occurrences" and the so- called "double anchor" question, viz., whether it was necessary that exposure and injury both occur during the policy period). Fibreboard Exhs. 225-242, 245, 246.

44. Oral argument upon the Coverage Case appeal was conducted in several phases during the Summer of 1993. Continental Exh. 23; Fibreboard Exhs. 243, 247. In late July 1993, the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final phase of the appeal had been scheduled by that court for August 27, 1993, and, on that date, the final oral argument before the Court of Appeal in fact was heard. Tr. at 329, 1400-01, 1480-81; Fibreboard Exh. 248. On that same day an agreement in principle was announced in this Court with

respect to the settlement that is now before this Court for consideration. Findings of Fact ¶ 179.

45. After the announcement of the global agreement in principle on August 27, 1993, the parties to that agreement wrote to the California Court of Appeal advising the court of the agreement in principle and asking that the court defer decision in the Coverage Case, at least with respect to those issues unique to Fibreboard and the Insurers pending the completion of the documentation necessary to consummate the settlement contemplated by the agreement in principle. Fibreboard Exhs. 249, 252.

46. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment in the Coverage Case, while reversing the trial court as to one such aspect that had been decided in Fibreboard's favor and against the Insurers. Fibreboard Exh. 254. However, the Court of Appeal simultaneously granted the joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Tr. at 1497-98; Fibreboard Exh. 253. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

47. Requests for rehearing by the Court of Appeal as to the issues the Court of Appeal did decide were thereafter denied. Fibreboard Exh. 255. On January 27, 1994,

Insurance. Co., 5 Cal. Rptr. 2d 356 (Cal. Ct. App. 1992), aff'd 1995 WL 389860, ___Cal. Rptr. 2d___ (1995), and/or Stonewall Ins. Co. v. City of Palos Verdes Estates, 9 Cal. Rptr. 2d 663 (Cal. Ct. App. 1992), review granted, 834 P.2d 1147 (Cal. 1992). According to Justice Kaufman, although not identical, both the Montrose and Stonewall cases involve "trigger of coverage" issues.[12] Stonewall also involves the "scope of coverage" issue. Continental Exh. 5 at 10, ¶ 19.

52. In addition, according to Justice Kaufman unless the California Supreme Court vacates the "grant and hold" status of the Coverage Case and either decides to hear the issues in the Coverage Case or dismisses review, it is likely that, once it has decided Montrose and/or Stonewall, the Supreme Court will remand the Coverage Case to the Court of Appeal. In that event, the Court of Appeal will be instructed to reconsider its Coverage Case opinion in light of the Supreme Court's Montrose and/or Stonewall decision(s), and the Court of Appeal will almost surely allow the parties the opportunity for further briefing and oral argument. The resulting decision of the Court of Appeal -- which would presumably also include the reserved issues -- would then be subject to another petition for review to the Supreme Court. Given the fact that Stonewall has not been set for oral argument yet, and the fact that after

---

[12]On July 5, 1995, the California Supreme Court affirmed the appellate court's decision in Montrose. The supreme court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, ___Cal. Rptr. 2d___, ___ n. 16 (1995).

Montrose and Stonewall are finally decided a remand of the Coverage Case to the Court of Appeal followed by another petition for review to the Supreme Court is likely, Justice Kaufman believes that the Coverage Case may not be finally concluded for five years or more. Continental Exh. 5 at 10-11, ¶ 20.

53. There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage; (ii) scope of coverage; (iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues -- trigger of coverage and scope of coverage -- involve both the Continental and Pacific policies. Two issues -- number of occurrences and double anchor -- involve only the Continental policy. The lost policy issue involves only the Pacific policy. Continental Exh. 5 at 11-12, ¶ 21.

54. The California trial court hearing the Coverage Case decided each of the five issues adversely to Continental and Pacific. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims.

the Insurers' petitions for review of the Court of Appeal's decision were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Tr. at 1498; Fibreboard Exhs. 256, 258, 259; Continental Exh. 5 at 10, ¶ 19.

48. Two expert witnesses, Justice Marcus M. Kaufman and Professor George Priest, testified at the fairness hearing in this action with respect to the issue of the risk -- viewed both as of August 27, 1993 and today -- that Fibreboard would lose the Coverage Case pending in the California appellate courts.[9] No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

49. Justice Kaufman[10] provided expert witness testimony on the uncertainty -- as of both August 27, 1993 and the present --as to how the appellate courts will

---

[9]The Court finds that the testimony of all of the witnesses offered in support of this settlement -- including that of Justice Kaufman and Professor Priest -- was credible.

[10]Justice Kaufman was in private practice from 1958 until 1970, specializing in civil litigation. He then served for seventeen years, from January 1970 until March 1987, as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division. From March 1987 until January 1990, he served as Associate Justice of the California Supreme Court by appointment of Governor George Deukmejian. Presently, he is of counsel to the law firm of Buchalter, Nemer, Fields & Younger. His practice consists principally of appellate litigation, often as a consulting expert, with special emphasis on insurance matters. Continental Exh. 5 at 1-2, ¶ 2.

resolve several legal questions in the Coverage Case that are either presently pending before the California Supreme Court or that were reserved for decision by the California Court of Appeal. In particular, he focused on the likelihood that the California Supreme Court (or the Court of Appeal on the reserved issues) will or will not afford the Insurers relief on one or more of the coverage issues raised, on the likely timing of potential rulings in the Coverage Case, on the likely effect resolution of other cases now pending before the California Supreme Court will have on the Coverage Case, and on the California judicial process in general. Continental Exh. 5 at 2-3, ¶ 3.

50. Professor Priest[11] provided expert testimony on the likelihood, as of both August 27, 1993 and the present, that the California appellate courts would provide the Insurers relief on one or more of the coverage issues raised. The Court finds that both Justice Kaufman and Professor Priest are highly qualified experts in their fields, and finds their conclusions and reasoning to be persuasive.

51. According to Justice Kaufman, it is likely that the Supreme Court decided to "hold" the Coverage Case pending the outcome in Montrose Chemical Corp. v. Admiral

---

[11]Professor Priest is currently a Professor of Law at Yale University. Continental Exh. 6. The focus of his teaching and writing has been the study of the tort system, and, in particular, trends in tort and insurance law over the last 50 or 60 years, including recent developments. Tr. at 767. He has testified as an expert in both tort and insurance matters, including expert testimony about California insurance matters. Tr. at 767-68. Among his other duties at Yale, Professor Priest teaches a class on insurance, including an analysis of comprehensive general liability insurance policies and the California Supreme Court's approach to insurance matters. Tr. at 769-70.

It was also their opinion that the same risk exists today. Continental Ex. 5 at 12-46, ¶¶ 22-86; Tr. at 771-93.

55. Justice Kaufman's conclusions were based upon his analysis of (i) the policy language; (ii) the California Supreme Court 's current approach to the resolution of insurance coverage issues in particular and litigation in general; (iii) distinctions between the application of contract law pursuant to which insurance polices are to be interpreted and tort law under which an asbestos manufacturer's liability is determined; (iv) recent insurance cases either pending before or decided by the California Supreme Court or decided by other courts; and (v) recent California Supreme Court decisions in non-insurance cases. Continental Exh. 5.

56. Professor Priest focused on the trend of the law in both California and elsewhere against what he termed "enterprise liability." This trend includes interpreting insurance policies issues more narrowly in order to make insurance coverage more predictable and certain and therefore more available to consumers at reasonable prices. Tr. at 772- 91.

57. The Court finds that the risk attending the outcome of the Coverage Case was a matter of reasonable and substantial concern for counsel for all of the parties to the settlement at bar to have had, and to continue to have, and a legitimate factor and driving force in the negotiations that resulted in that settlement. Tr. at 792-93, 1056-59.

IV. FIBREBOARD'S RESPONSES TO ASBESTOS LITIGATION

A. The Fibreboard Structured Settlement Program

58. In August 1988, Fibreboard informed Continental that the ACF was dissolving, and contended that Continental was obliged to provide a defense in the asbestos injury cases being prosecuted against Fibreboard. Fibreboard Exhs. 400, 401. The ACF stopped operations and ceased providing a defense to its members in September 1988. Fibreboard had insurance proceeds of approximately $100 million available from settlements with AIG and with Home Insurance Company. Fibreboard's only other remaining insurance resources were the disputed coverages under the Pacific and Continental policies. Tr. at 148-49.

59. Upon dissolution of the ACF, Fibreboard was in a highly unusual situation compared to other asbestos defendants. It was a small company, valued by the market -- in light of its potential asbestos liabilities -- at $10 to $15 million. Tr. at 911-13; Fibreboard Exhs. 700, 701. It did not have enough cash to pay all or any substantial part of the asbestos injury claims asserted against it, but it had potentially very valuable insurance assets in the form of the disputed Continental and Pacific policies. Tr. at 169-70.

60. Faced with this situation, in September 1988 Fibreboard embarked upon a novel method of settling asbestos cases called the "Structured Settlement Program, " or "SSP." Under the SSP, Fibreboard agreed to make payments on a deferred basis, that is, payment would be made when the insurance coverage dispute with Continental and Pacific was resolved. Fibreboard approached members of the asbestos

plaintiffs' bar, revealed the facts about its corporate worth and its insurance situation, and asked for what in a sense was credit, or a "bridge" loan, to keep the company viable until the Coverage Case was finally resolved. As originally conceived, the SSP called for no cash payable at the time a settlement agreement was reached. Tr. at 170-71, 958.

61. However, the members of the plaintiffs' bar refused to accept the SSP as originally offered, insisting that they receive both cash and assurances that Fibreboard would not engage in asset-hiding tactics or other so-called "scorched-earth" ligation tactics. Tr. at 171-72. The attorneys whom other members of the asbestos plaintiffs' bar consulted on SSP-related matters were principally Steven Kazan and Harry Wartnick. Messrs. Kazan and Wartnick negotiated a revised program with Fibreboard by which 40% cash was payable for what came to be called "pre-1959" exposure cases, i.e., those cases in which the claimant was first exposed to asbestos before the end of the Continental policy period (March 15, 1959), and thus for which Fibreboard alleged it had coverage under the Continental and/or Pacific policies.[13] The deferred payments were due September 1, 1993, which deadline could be extended, if the Coverage Case was not by then resolved to September 1, 1996. The SSP contracts provided that Fibreboard would not make any excessive dividend distributions, or undertake corporate reorganizations that could siphon off corporate assets beyond the reach of asbestos claimants. Fibreboard Exh. 901; Tr. at 169-73.

---

[13]Conversely, those cases or claims arising out of first exposure to asbestos after March 15, 1959, are commonly known as "post-1959" cases or claims.

62. Fibreboard's strategy was simple. It asked that claimants defer collection of agreed-upon settlement amounts until the Coverage Case was resolved. In return, it undertook to conserve corporate assets as the Coverage Case made its way through the appellate process. If Fibreboard won the Coverage Case, those plaintiffs who accepted SSP settlements would be paid from insurance proceeds. If Fibreboard lost the Coverage Case, all of the company's assets would be turned over to the plaintiffs. Tr. at 170-74.

63. The revised SSP was offered on a standard basis nationwide, and was accepted generally by plaintiffs' counsel. However, plaintiffs demanded increased settlement values reflecting the fact that the SSP vehicle presented a risk that they would never collect the deferred portion of the payment if Fibreboard lost the Coverage Case. Tr. at 176-77.

64. Fibreboard's strategy of deferring payment of settlements until resolution of its insurance disputes, and committing to keep corporate assets intact and available to claimants were the Coverage Case to be lost, differed from that taken by other asbestos defendants. Manville, which had the largest share of liability of any defendant (30% to 33%), entered bankruptcy while still an otherwise financially healthy company. Other asbestos defendants, such as Raymark and Celotex, spent considerable corporate resources defending cases as their corporate resources (including insurance) dwindled. These defendants adopted so-called "matrix" settlement systems, offering fixed, low-value settlement amounts for specific diseases, then reorganizing their corporate structures in such a way that remaining assets would not be available to claimants,

and then entering bankruptcy. These "scorched-earth" litigation tactics generated substantial trial activity. Fitzpatrick Tr. at 79-81; Tr. at 151-54; Fibreboard Exh. 101 at 12, 48.

B. The Fibreboard-Continental "Interim Agreement"

65. In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement." Fibreboard Exh. 900. The Interim Agreement included the following basic provisions:

> -- Fibreboard released Continental from claims for bad faith damages that were scheduled to be tried in the Coverage Case. -- Continental agreed to fund the 40% cash component of the SSP settlements, after Fibreboard first exhausted the monies it had available from the AIG and Home Insurance Company settlements.
>
> -- If Fibreboard prevailed in the Coverage Case, Continental would repay or credit the AIG and Home Insurance Company monies Fibreboard had spent, in order that the credit amounts would be available to pay uninsured cases i.e., post-1959 cases. By the same token, if Fibreboard lost the Coverage Case, Fibreboard would reimburse Continental for monies Continental had paid for Fibreboard's defense and indemnity under the Interim Agreement.

-- Continental agreed to fund Fibreboard's defense up to annual limits, or "caps," of $25 million to $29 million per year.

-- Continental and Fibreboard agreed to cooperate in the joint investigation, evaluation, management, defense, and disposition of pre-1959 claims.

-- The Interim Agreement was to expire upon the earlier of the end of 1992, or finality of the appeal of the Coverage Case. Tr. at 174-75; Fibreboard Exh. 900.

66. The SSP did not solve Fibreboard's settlement problems. As other defendants were taken to trial, plaintiffs also often would take Fibreboard to trial rather than attempting to resolve credit or set-off problems created by the SSP. Tr. at 180-82. The SSP was not adequate to dispose of large groups of cases that were consolidated for trial. the result was that Fibreboard became a defendant in trials of large consolidated cases, including the Cimino case in this Court, the Denver Turley case in West Virginia, the Baltimore consolidated cases, and the Brooklyn Navy Shipyard cases. These circumstances generated substantial defense expenditures by Fibreboard. Tr. at 180-82; Fibreboard Exhs. 104, 105, 107-117, 120-124.

67. Fibreboard's efforts to adjust to the post-ACF litigation setting were very costly. Fibreboard's defense costs from September 1988 through 1989 were $50 million, almost twice the total face value of settlements negotiated during that period. In 1990, Fibreboard's defense costs were

$52 million, as compared to $45 million of nominal value in negotiated settlements. Fibreboard Exh. 919, Tab 3; Tr. 230-31, 432-33.

68. By June 1990, the annual defense 'cap" for all of 1990 under the Interim Agreement had been reached, and Continental therefore declined to pay for defense costs incurred thereafter in 1990. Fibreboard Exhs. 402, 405; Tr. at 181-82.

C. Fibreboard-Pacific Negotiations and the Fibreboard-Pacific Agreements

69. In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate complete settlements of the policies. Continental declined the proposal. Pacific and Fibreboard pursued such negotiations. Tr. at 184-85.

70. Fibreboard was interested in pursuing separate negotiations with Pacific because Fibreboard had no coverage for post-1959 claims. The Coverage Case judgment required each policy to respond to a claim as to which first exposure to asbestos occurred before the expiration date of the policy. Because the Continental policy followed the Pacific policy, under the judgment any claim covered by the Pacific policy was also covered by the Continental policy. Fibreboard Exh. 223; Tr. at 184-87.

71. Beginning in 1990 and continuing into 1992, separate negotiations between Fibreboard and Pacific

produced two separate agreements. On March 1, 1991, Pacific and Fibreboard entered into a written settlement entitled "Settlement Agreement." Fibreboard Exh. 902 (referred to as the "Pacific I Agreement"). The Pacific I Agreement provided that the parties would apply jointly to the California Court of Appeal to seek reversal of that part of the Coverage Case judgment that pertained to the Phase I jury verdict against Pacific (determining the existence and terms of the Pacific policy). The agreement provided that the settlement would become effective on the date the Court of Appeal's order reversing the judgment with respect to the Phase I verdict became final. The effect of such a reversal was intended to be the elimination of any further liability of Pacific under its policy. The Pacific I Agreement provided for payments by Pacific for Fibreboard's benefit totalling $142 million, of which $107 million was payable to a trust, for use exclusively to pay post-1959 asbestos injury claims, or, if not so needed, for asbestos property damage claims. Tr. at 186-88.

72. On March 5, 1991, a different division of the Court of Appeal from that in which the Coverage Case was pending issued an opinion in Neary v. Regents of the University of California, 278 Cal. Rptr. 773 (1991), rev'd, 834 P.2d 119 (Cal. 1992). The Court in Neary refused to reverse a trial court judgment on stipulation of the parties, where reversal was a condition to settlement. Tr. at 188; Fibreboard Exh. 903.

73. On April 19, 1991, Fibreboard and Pacific filed a motion for stipulated reversal of the judgment. The Court of Appeal denied the motion on October 3, 1991. Fibreboard Exh. 904. Thereafter, the time limit for achieving

the stipulated reversal expired and the Pacific I Agreement did not become effective. Tr. at 188-91.

74. On March 27, 1992, Pacific and Fibreboard entered into a second agreement. Fibreboard Exh. 905 (referred to as the "Pacific II Agreement"). Under the Pacific II Agreement, Pacific paid Fibreboard $9 million in the form of a loan, together with $1 million under a separate agreement providing for a rescission of the Pacific policy. Pacific also agreed to provide interim funding for defense and indemnity in excess of that provided by Continental, not to exceed $20 million. In addition, Pacific agreed to pay further sums to Fibreboard at the conclusion of the Coverage Case, but only if Fibreboard prevailed on the Phase III issues of trigger and scope. If so, and depending on the decision as to Phase I issues (the existence and terms of the Pacific policy), Pacific agreed to pay $105 million (if Fibreboard won on Phase I) or $80 million (if Fibreboard did not win). In addition, if Fibreboard obtained a "Final 5.2 Order,"[14] Pacific agreed to pay an additional $225 million (if Fibreboard won Phase I), or $140 million (if Fibreboard did not win). Thus, the Pacific II Agreement called for a maximum payment to Fibreboard of $360 million, of which $225 million depended on Fibreboard obtaining a "Final 5.2 Order." As was the case with Pacific I, these payments, other than interim funds, were to be paid into trust to pay post-1959 asbestos injury claims, with any surplus

---

[14]A "Final 5.2 Order" (so-called on account of the paragraph number in the agreement that defined the term) was a final order determining that Continental would have no rights against Pacific for any asbestos-related defense or indemnity costs that Continental had, before the date of the Pacific II Agreement, neither agreed to pay (issuing a policy without more was not such an agreement) nor actually paid.

payable for asbestos property damage claims. Fibreboard Exh. 905. The Pacific II Agreement called for, and the parties executed, a rescission of all Pacific policies that might cover Fibreboard's asbestos claims. Fibreboard Exh. 906; Tr. at 188-91.

D. The Fibreboard Assignment Settlement Program and Related Litigation

75. In early 1991, Fibreboard believed it faced extreme circumstances that caused it to initiate a new settlement program. Tr. at 182. Confronted with the inability to settle large groups of cases through the SSP, Fibreboard faced major consolidated trials in Texas, Mississippi and Baltimore. Together with the exhaustion of defense monies under the Interim Agreement "caps," this led Fibreboard to initiate the assignment settlement program. Tr. at 182. Unlike the SSP, the terms of each assignment settlement were separately negotiated, and were not identical. Their basic structures were all very similar, however. In settlement of pre-1959 exposure cases, Fibreboard paid the claimants no cash at the time the settlement agreement was made, but rather granted an assignment of rights to proceeds under the Continental policy, together with any bad faith claims for Continental's failure to pay the assigned amount. If Fibreboard lost the Coverage Case, it was responsible to pay the entire settlement amounts. In post-1959 cases, claimants were given an SSP promise to pay. Tr. at 191-93; Continental Exh. 14. Plaintiffs who entered into assignment settlements demanded that Fibreboard obtain a judicial confirmation of Fibreboard's right to make the assignments. Tr. at 196.

76. Assignment settlements typically covered a law firm's entire caseload, but with provisions that addressed the possibility that certain claimants might reject the negotiated settlement. As it had done in the SSP settlements, under the assignment settlement program Fibreboard agreed to preserve its net worth and corporate resources, so that if it did lose the Coverage Case it could be liquidated for the benefit of asbestos claimants. Tr. at 193, 212-13; Continental Exh. 14.

77. Under the assignment settlement program, as was the case with the SSP before, nominal settlement values tended to increase again because, among other reasons (i) plaintiffs had to accept the increased risk that they would never be paid if Fibreboard lost the Coverage Case (they were receiving no cash, whereas under the SSP they had received 40% in cash); (ii) the assignments were of questionable validity under California law; and (iii) Continental now took the position that the assignment settlement program vitiated insurance coverage even if Fibreboard were to win the Coverage Case. Tr. at 195-96. The average settlement amount under the SSP held steady at roughly $5,400 per case; on the other hand, the assignment settlement average overall more than doubled, rising to over $11,400 per case. Tr. at 195-201; Fibreboard Exh. 919, Tabs 18-21. The weight of the assignment settlement program served to put pressure on Continental to engage in global settlement negotiations. Tr. at 608-09, 1082-84, 1177-78, 1325-28.

78. Continental strongly objected to the assignment settlements and office-wide settlements on several grounds, including that Fibreboard had no right to enter into them, that they breached the Interim Agreement provisions

calling for joint management of the cases and claim-by-claim evaluation of cases, and that they violated policy provisions prohibiting assignments of policy rights and settlements without Continental's consent. Continental also objected to the assignment settlements on the grounds that the settlement amounts were inflated and that pre-1959 (insured) claims bore a disproportionately high share of gross settlement amounts in each office-wide settlement agreement. Tr. at 195-96.

79. A broad, bitter and costly conflict ensued be- tween Fibreboard and Continental over the assignment program, and related issues. This conflict persisted through 1991 and 1992, and led to an agreement entered into on April 9, 1993 between Fibreboard and Continental, which has become known as the "April 9 Agreement." Fibreboard Exh. 908; Tr. at 1340-47.

80. In the conflict over the assignment settlement program, Continental took the position that the December 1988 "Interim Agreement" had redefined its policy obligations for the interim period, and that, if it complied with the Interim Agreement, it had provided all the defense that it was obligated to provide. Fibreboard took the position that an obligation to provide a full defense under the insurance policy still existed, that if payments under the Interim Agreement for defense were not adequate then Continental had not complied with its policy defense obligations leaving Fibreboard free to enter into settlements without Continental's consent, and that Fibreboard could do so by way of assignment of proceeds under the Continental policy. Tr. at 202-03.

81. Continental's objections began with the first assignment settlement, in the Cimino litigation. Continental Exh. 14; Fibreboard Exhs. 403, 500. Continental consistently objected to use of the assignment vehicle in all settlements, including the Brooklyn Navy Shipyard cases brought by the Levy, Phillips law firm (Fibreboard Exh. 407), the Weitz & Luxenberg cases (Fibreboard Exh. 409), and the Kazan cases (Fibreboard Exhs. 410, 411), among several others. Fibreboard Exhs. 406, 408, 416, 430, 431.

82. Continental asserted and continues to assert that the assignment settlement program not only violated various provisions of the Interim Agreement, but also the insurance policy itself, including provisions prohibiting assignment of interests under the policy, prohibiting settlements without Continental's consent, prohibiting action against Continental other than for declaratory relief, mandating cooperation, and prohibiting assumption of obligations. Fibreboard Exh. 412; Tr. at 202-04. Continental further asserted, and continues to assert, that Fibreboard's use of assignments had vitiated its coverage altogether, quite apart from the outcome of the Coverage Case. Tr. at 1515-17. Fibreboard adamantly rejected, and continues to disagree with, Continental's position in this regard, and asserts that Continental has no right to make any such claims. Tr. at 1545-46.

83. Several lawsuits were brought by Fibreboard against Continental to test whether Fibreboard legally could enter into settlements using the assignment mechanism. The first action, known as Andrus v. Fibreboard Corp., was filed by Fibreboard on April 1, 1991 in state court in

Alameda County, California, in connection with a proposed settlement of asbestos cases brought by Mr. Kazan's firm. Fibreboard Exhs. 303, 304.

84. On June 28, 1991, Continental filed an action in federal court in California, challenging the pending assignment settlement of the Cimino cases. Fibreboard Exhs. 305, 308. Eventually, that action was dismissed in favor of a third-party action filed in July 1991 by Fibreboard against Continental in Cimino seeking approval of the Cimino assignment settlement. Fibreboard Exhs. 306, 312, 313; Tr. at 206.

85. Fibreboard brought similar actions in federal court in New York to validate assignment settlements with claimants represented by the Levy, Phillips firm, and those represented by Weitz & Luxenberg. Fibreboard Exhs. 307, 311. Those matters were settled directly by Continental with claimants, immediately before trial or hearing, without a judicial determination as to the validity of the assignment vehicle, and, accordingly, Fibreboard's efforts to obtain an early ruling in its favor on the assignment issue did not succeed. Fibreboard Exhs. 310, 314; Tr. at 205-06.

86. Mr. Kazan did not settle the cases involved in the Andrus action directly with Continental. Fibreboard Exhs. 421, 422. On June 1, 1992, Judge Kawaichi of the Superior Court in Alameda County granted summary adjudication in Andrus in Fibreboard's favor, ruling that Fibreboard had the right to make reasonable settlements by way of assignment. Fibreboard Exh. 315. Judge Kawaichi reaffirmed that order on July 6, 1992, on Continental's motion

for reconsideration. Fibreboard Exh. 317. On September 2, 1992, the California Court of Appeal summarily rejected Continental's petition for writ of mandate, Fibreboard Exhs. 318, 321, and judgment in Andrus was entered in Fibreboard's favor in September 1992. Fibreboard Exh. 322; Tr. at 206-08.

87. On July 8, 1992, shortly after Judge Kawaichi reaffirmed the Andrus summary adjudication, Continental wrote Fibreboard stating that, notwithstanding the defense cap provisions in the Interim Agreement, Continental would provide a defense in accordance with applicable law. Fibreboard Exh. 435. Continental then reiterated its position that Fibreboard had no basis to make assignment settlements, given the position taken in the July 8 letter. Fibreboard Exh. 436. Fibreboard contended that Continental's offer to provide a full defense came too late. This new dispute provoked a series of correspondence, with each side arguing its contention, and with Fibreboard eventually taking the position in January 1993 that Continental could not remedy the situation created by its past failures to defend as long as Continental continued to reserve its coverage position. Fibreboard Exhs. 439-441, 446, 450, 452, 454, 468; Tr. at 234- 36.

88. The controversies between Continental and Fibreboard involved many areas in addition to Continental's objections to Fibreboard settling claims by way of assignments. Fibreboard contended that Continental refused to pay defense-related costs, such as those for a computerized case management system, a case processing center, and costs of negotiating assignment settlements. Fibreboard Exhs. 419, 434. Continental argued that Fibreboard's method for allocating amounts to individual cases based on duration of exposure, date

of first exposure, and disease (known as the "point system"), improperly weighted the settlement amounts in group or inventory settlements to pre-1959 cases. Fibreboard Exh. 410. Continental desired to attend settlement negotiations between Fibreboard's counsel and claimants' counsel; Fibreboard insisted on preconditions to such attendance. Fibreboard Exh. 413. When Continental developed its own settlement program, containing a 10% cash component, Fibreboard objected to that, Fibreboard Exhs. 437, 438, 442, 443, and to Continental's efforts to make settlement offers directly to claimants' counsel rather than through Fibreboard's counsel. Fibreboard Exhs. 415, 417. After Continental negotiated privately with counsel for the Cimino claimants, Fibreboard took the position that Continental had assumed full responsibility for all of those cases. Fibreboard Exh. 432. Continental's efforts to transform the settlement process into one in which it fully participated, by way of three-party agreements (that is, including Fibreboard, plaintiffs and Continental), led to contentions by Fibreboard that there was no agreed-upon three-party settlement structure, and Continental's assertion that there was. Fibreboard Exhs. 452, 457, 459, 460.

V. HISTORY OF GLOBAL SETTLEMENT NEGOTIATIONS

A. Early Global Negotiations (1990-1992)

89. A number of factors prompted Fibreboard to begin to explore the possibility of a global resolution of all of its asbestos injury liabilities in late 1990 and early 1991. Fibreboard was locked in a significant dispute with Continental and did not have enough money to defend itself. As a result, it entered into the Pacific I Agreement -- and, later, the Pacific II

Agreement -- to obtain funds. Tr. at 208-09. It then commenced the assignment settlement program in order to try to bring the underlying litigation closer to Continental, believing that it was important that Continental feel as threatened as Fibreboard did before Fibreboard would be able to receive some protection from Continental. Fibreboard wanted, in short, to get Continental interested in Fibreboard's entire asbestos problem. Fibreboard believed that in order to bring Continental to the bargaining table with respect to resolving all of Fibreboard's asbestos injury liabilities (pre-1959 and post-1959 claims), it was necessary to demonstrate progress toward assignment-based global settlement negotiations with the plaintiffs. Tr. at 209,633.

90. Other developments contributed to Fibreboard's interest in seeking a global resolution. Fibreboard was particularly motivated by the Linscomb action, filed in this Court in July of 1990 as a Rule 23(b)(1)(B) present and future claims class action, which had been widely discussed as a vehicle for "limited fund" treatment of certain defendants, including Fibreboard. Tr. at 210; Fitzpatrick Tr. at 86-87; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117. At the 1990 Federal Judicial Center meeting at the Dolley Madison House in Washington, D.C., the message taken away by Fibreboard was that litigants should devise a solution to the asbestos problem, or the courts would impose a solution the litigants might not like. Tr. at 211; Fitzpatrick Tr. at 83-84. In September 1990, the Asbestos Ad Hoc Committee had been commissioned to report on the asbestos problem in the courts. In November 1990, eight federal judges had written a letter to the MDL Panel requesting transfer under 28 U.S.C. ¶1407 of federal asbestos cases to Judge Weiner. Fibreboard Exh. 118. All of these

developments stimulated Fibreboard's interest in global settlement discussions. Tr. at 208-11.

91. Fibreboard initially approached Mr. Motley of the Ness Motley firm to discuss a global settlement because he had been outspoken about the need for alternative approaches at the Dolley Madison House meeting, because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any global settlement, and because Ness Motley was involved in virtually all major trials against Fibreboard. Tr. at 211-12. Mr. Motley -- together with his partner at Ness Motley, Joseph F. Rice -- eventually agreed to consider a global settlement on an assignment basis. As proposed by Fibreboard, such a settlement would have the following elemental structure: if Fibreboard confirmed its coverage through a victory in the Coverage Case, plaintiffs would look only to Fibreboard's insurance assets for compensation, and not to Fibreboard's other (non-insurance) assets; if Fibreboard lost its coverage as the result of a loss in the Coverage Case, in contrast, plaintiffs could "have the company." Tr. at 212-13.

92. Fibreboard also approached Messrs. Kazan and Wartnick in late 1990 or in early 1991 suggesting that they consider a global settlement. Kazan and Wartnick were logical choices because they had the most information about Fibreboard's West Coast activity, and other asbestos plaintiffs' lawyers looked to them for guidance in the Fibreboard litigation. Fibreboard felt that negotiations would have credibility only if they, as experts on Fibreboard, were involved. Tr. at 213-14. Messrs. Kazan and Wartnick contacted Mr. Motley in the belief that Ness Motley would have to be

involved if any global settlement was to succeed. Tr. at 644-45.

93. Having decided to go forward with negotiations with Fibreboard with respect to an assignment-based global settlement of present and future claims, the Ness Motley lawyers and Messrs. Kazan and Wartnick ("Plaintiffs' Counsel")[15] took several steps to increase their negotiating effectiveness. They retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise. Tr. at 646, 1555-56. The primary lawyers at Caplin & Drysdale involved in this representation were Elihu Inselbuch and Peter Van N. Lockwood. Either Mr. Inselbuch or Mr. Lockwood or both were present at most of the discussions and negotiations described herein. Fibreboard Exhs. 505, 511; Tr. at 1382, 1450, 1466, 1550-51, 1555. Although Caplin & Drysdale at no time represented individual asbestos plaintiffs, that firm had had extensive experience in the asbestos field, including work in connection with the Manville bankruptcy and trust. Tr. at 1556. This Court finds that it was prudent and reasonable for Plaintiffs' Counsel to have retained them.

94. At the request of Plaintiffs' Counsel, Fibreboard supplied them with information about its past claims experiences, historical settlement averages, and financial

---

[15]Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

information, on a confidential basis. Tr. at 215-16, 648; Fibreboard Exhs. 501-15.

95. In negotiating a potential global settlement, Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years or asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos, including sales records and other information. Tr. at 937-38. This Court finds that Plaintiffs' Counsel's extensive knowledge of Fibreboard and its operations was more than sufficient to permit them to negotiate effectively.

96. In 1991, Plaintiffs' Counsel retained James Sinclair, an investment banker, to provide an estimated value of Fibreboard absent its asbestos-related liabilities. Tr. at 648. Mr. Sinclair conducted an analysis and estimated such value of Fibreboard to be between $230 million and $240 million. Ortiz Exh. 1.

97. Plaintiffs' Counsel also retained Dr. William Nicholson, a prominent and distinguished epidemiologist at Mount Sinai Hospital in New York, to provide them with a projection of the number of future asbestos-related claims against Fibreboard. Tr. at 216, 648, 836-39, 849. Dr. Nicholson is the author (together with Drs. Selikoff and Perkel) of a 1982 study entitled "Occupational Exposure to Asbestos:

Population at Risk and Projected Mortality, 1980- 2030," which estimated the population that had been exposed to asbestos (of all manufacturers) in the past, and the number of resulting cancer cases from 1980 onward. Tr. at 839-49; Class Plaintiffs Exh. 1011. Dr. Nicholson's work in the field of future asbestos claims projections has been among the most accurate work done to date. Tr. at 648-49.

98. At the request of Plaintiffs' Counsel, Dr. Nicholson was provided with data from Fibreboard concerning number of claims against Fibreboard per year by industry; time of claimant's first employment; duration of claimant's employment; age of claimant; and type of claimant's disease. To the extent that gaps were found to exist in this database, Dr. Nicholson sought to fill those gaps with information gathered in connection with the Manville proceedings. Tr. at 216, 850- 51. Using this data, together with the results of this 1982 study, Dr. Nicholson made an estimate of the number of future claims against Fibreboard. The estimate, taking into account the uncertainty acknowledged by Dr. Nicholson, provided a range of just over 120,000 claims to just under 190,000 claims for the period beginning in September 1993 and continuing through 2029. Tr. at 851-58; Class Plaintiffs Exhs. 1010, 1012, 1018.

99. Dr. Nicholson's work was done in 1991. However, he reexamined his work during 1993 when projections by others were published in connection with the Manville trust litigation, and he reaffirmed the validity of his analyses and conclusions in August 1993. Tr. at 861-65. As Dr. Nicholson explained, mesothelioma projections among those exposed to Fibreboard asbestos logically peaked earlier in time and fell off faster than projections for persons exposed to

Manville products because of the different asbestos exposure patterns created by the different products of the two entities. Exposure to Fibreboard products was more common in shipyards during World War II, Tr. at 861-63, whereas Manville products were more broadly used over a wider period of time. It is thus inappropriate to compare Manville claims projections with Fibreboard claims projections. Tr. at 863.

100. Based on Dr. Nicholson's methodology, the his- torical accuracy of his work in the field of future asbestos claims projections, and his exemplary reputation in his field, the Court finds that it was prudent for Plaintiffs' Counsel to have retained Dr. Nicholson, and reasonable for them to have relied on his projections in their subsequent global settlement negotiations.

101. In 1990 and 1991, some of Plaintiffs' Counsel (together with other lawyers acting for asbestos claimants) had engaged in global negotiations with representatives of many asbestos defendants under the aegis of the Linscomb global class action pending in this Court. Fitzpatrick Tr. at 87-89. While those global negotiations never reached closure, a consensus among members of the plaintiffs' bar developed about overall average settlement values for each asbestos-related disease and the respective settlement shares of the various asbestos defendants. This consensus was taken into consideration by Plaintiffs' Counsel in their negotiations with Fibreboard. Tr. at 650-51, 1129-36.

102. Based upon their own broad experience, which included the SSP and assignment settlement program negotiations, the Linscomb negotiations, and the estimates from

Mr. Sinclair and Dr. Nicholson, Plaintiffs' Counsel formulated a negotiating position with respect to an assignment-based global settlement. To do so, Plaintiffs' Counsel needed to estimate the number of future asbestos claims against Fibreboard, the value of those claims, as well as the proportion of claims representing pre-1959 and post-1959 exposures. The work that had been done in connection with the Linscomb action provided appropriate national average settlement values for various diseases. And Fibreboard's share from time to time of the national averages could be derived from ACF data and knowledge of the asbestos litigation. This information provided a reasonable basis for Plaintiffs' Counsel to use in global negotiations. Tr. at 650-52.

103. Prior to and during global negotiations, Plaintiffs' Counsel kept themselves informed of developments in the Coverage Case by obtaining and reviewing, inter alia, copies of the trial court's tentative decisions, the trial court's judgment, and the briefs submitted to the California Court of Appeal. Tr. at 643-44; Fibreboard Exh. 500.

104. In addition, later in the negotiating process the Ness Motley lawyers retained and consulted with Professor Samuel Dash with respect to ethical issues. Tr. at 1551-53.

105. This Court finds that Plaintiffs' Counsel correctly identified those areas in which outside assistance would help them to negotiate a global settlement more effectively on behalf of asbestos claimants, and that they took appropriate steps to obtain such outside assistance. In addition, this Court finds that Plaintiffs' Counsel took the

necessary and proper steps to inform themselves of the pertinent facts and law so as to be able to formulate an effective negotiating position and to carry out their professional responsibilities in accord with the ethical standards governing attorneys. Tr. at 412-13.

106. Fibreboard asked that Plaintiffs' Counsel keep their colleagues in the plaintiffs' bar informed about global settlement discussions, and reiterated that Fibreboard would not pay any non-insurance resources in settlement if it prevailed in the Coverage Case. Tr. at 215.

107. Continental was informed early in the global negotiation process, and objected to a global settlement by way of assignment, as it had objected to any settlements by way of assignments. Tr. at 216-17.

108. Because Continental was not at the table, Plaintiffs' Counsel developed the strategy of first establishing a ration between the present value of the total settlement amounts for pre-1959 (insured) and post-1959 (uninsured) claims. To do so they separately calculated the data for different periods of exposure, types of exposure, and settlement shares, so that it could be matched with Dr. Nicholson's projections respecting the number and types of future cases anticipated to be filed against Fibreboard. They then took the position that they would first negotiate only the post-1959 settlement price with Fibreboard, and that they then would use their predetermined ratio to derive the settlement price for the pre-1959 claims to avoid any argument by Continental that Fibreboard had, in effect made Continental (which would have responsibility for insured claims) pay for uninsured claims, which were Fibreboard's

responsibility. Fibreboard would retain liability for all amounts if the Coverage Case failed. Tr. at 217-18, 650-53.

109. The 1991-1992 global negotiations were conducted with respect to all present and future asbestos-related personal injury cases against Fibreboard. The parties negoiated in contemplation of a Rule 23(b)(3) opt-out class action structure. Given a choice, Plaintiffs' Counsel preferred an opt-out settlement class structure, and felt it would be easier to support legally. Plaintiffs' Counsel rejected Fibreboard's suggestions for total or partial mandatory class treatment (of e.g. punitive damages claims). Tr. at 218, 649.

110. Negotiations progressed to the point where the parties apparently had reached agreement on price terms of $278 million for the post-1959 cases, and $1.86 billion for the pre-1959 cases. These prices would have covered both present and future cases. The parties exchanged draft term sheets in November 1991. Fibreboard Exhs. 528-530. Fibreboard intended to pay the post-1959 settlement price with money to be derived from the Pacific I Agreement, together with credits to be received from Continental under the Interim Agreement, from some remaining AIG and Home Insurance Company settlement monies, and from recovery of unpaid defense costs from Continental. Tr. at 219-20.

111. Difficulties arose, however, in resolving questions about opt-outs and contribution and indemnity issues, Tr. at 226-28, and Plaintiffs' Counsel eventually took the position in December 1991 that negotiations were terminated. Fibreboard Exhs. 531, 532; Tr. at 228-30. Further attempts in 1992 to reach agreement on the terms of a global settlement

were unavailing, with issues as to how to handle opt-outs and contribution and indemnity claims continuing to present major difficulties. Tr. at 230; Fibreboard Exhs. 533-536, 543-545.

112. Continental was kept informed of the global negotiations, and stated its objections to Fibreboard's assignment-based global settlement negotiations. Tr. at 216-17; Fibreboard Exhs. 404, 423. Continental expressed its desire to negotiate directly with representatives of the claimants, Fibreboard Exhs. 516, 518; Tr. at 223, and attempted to participate in negotiations, but Plaintiffs' Counsel insisted on negotiating with Fibreboard so long as there was a coverage dispute. Fibreboard Exh. 519. Continental sought inclusion in the global negotiations, suggesting the possibility of a resolution subject to the final decision in the Coverage Case. Fibreboard Exhs. 522, 523.

113. In March 1992, Continental suggested a $1.5 billion settlement limited to pre-1959 claims (present and future), to be paid $100 million a year over 15 years. Other than $20 million payable yearly during the remainder of the Coverage Case, the Continental offer was subject to the outcome of that litigation. Fibreboard Exh. 539. Fibreboard objected to what it asserted was an improper attempt by Continental to address only part of the company's asbestos litigation problem, Fibreboard Exh. 541, and there were no substantial discussions of the proposal. Tr. at 228-29.

114. There had also been efforts in April and May 1992, initiated by Fibreboard, to find a way, satisfactory to both Fibreboard and Continental, to proceed with global negotiations with Plaintiffs' Counsel. Proposals included

Continental paying Fibreboard an amount of money to take responsibility for the entire asbestos problem, or Fibreboard turning over to Continental all its insurance, with Continental to assume responsibility for the entire problem. Fibreboard Exh. 424. These efforts were unavailing. Fibreboard Exhs. 425, 428, 429.

B. The Initial Ness Motley Agreement

115. In May 1992, when global negotiations had stalled, Fibreboard expressed an interest in settling all of the Ness Motley firm's asbestos cases. Tr. at 301, 1075. Mr. Snyder approached Messrs. Rice and Cox, who entered into negotiations for Ness Motley clients and on behalf of Ness Motley affiliate law firms across the country. The cases involved presented the broad range of asbestos-related diseases. Tr. at 301-03, 1076-78. These negotiations continued through the remainder of 1992. Tr. at 1076-84.

116. An agreement, now known as the "Initial Ness Motley Agreement," was signed December 30, 1992. Fibreboard Exh. 917. It covered 20,000 cases, at an average price of $13,000 per case, with provisions for adding more cases. It incorporated the point system, and was based on an assignment of rights under the Continental policy with respect to pre-1959 claims. Post-1959 claims were to be paid with monies derived from the Pacific II Agreement, and thus the Initial Ness Motley Agreement contained a provision requiring Fibreboard to obtain a Final 5.2 Order. With the Initial Ness Motley Agreement, by January 1993 Fibreboard had settlement agreements in place involving debt to asbestos bodily injury

claimants of over $1.2 billion, including $943 million in assignment settlements made in 1992. Tr. at 230-31.

C. Negotiations During 1993

1. Early 1993 To April 9, 1993

117. The Initial Ness Motley Agreement required that Fibreboard obtain Continental's assent to the assignment underlying it, or a court order approving that assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, Fibreboard Corp. v. Continental Casualty Co., Civil Action No. 6:93cv11 (E.D.Tex.), seeking (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Tr. at 232-33, 1327; Continental Exh. 22. Such a bar order was simultaneously sought by Fibreboard against Continental in state court in Alameda County, California. Continental Exh. 23.

118. In February 1993, Continental responded to this litigation by moving to dismiss or stay the action before this Court under the Declaratory Judgment Act (based on the pendency of the Alameda County action), and by moving to dismiss under Fed. R. Civ. P. 12 for failure to join Pacific as a party. In the Alameda County action, Continental cross-complained against Fibreboard for a declaratory judgment that

Fibreboard's assignment of rights under the Continental policy and its seeking a contribution bar order constituted breaches of the policy. Fibreboard thereafter responded, resisting the relief sought by Continental. Continental Exhs. 22, 23.

119. In early 1993, Continental made a corporate decision to determine whether it would be possible to achieve a global resolution of its entire Fibreboard asbestos-related liability. Tr. at 1330. In connection with this decision, on February 8, 1993, Continental's parent, CNA Financial Corporation, publicly announced that Continental would be seeking to discuss such a global settlement with Fibreboard, and that Continental was increasing its asbestos-related reserves by $1.5 billion. Tr. at 1330-31; Fibreboard Exh. 552. Fibreboard, in response, stated that it was "pleased that CNA has publicly acknowledged the order of magnitude of its potential liability arising from prior trial court judgments in Fibre- boards's favor. Fibreboard has been and remains ready to engage in good faith settlement negotiations with Continental." Continental Exh. 15.

120. At a status conference before this Court on March 10, 1993, at which representatives of Fibreboard, Con- tinental and Ness Motley were present, the Court and the par- ties discussed the possible appointment of a Settlement Facilitator. Tr. at 307-08, 1092-93.

121. On March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental. Tr. at 1093, 1332; Fibreboard Exh. 559.

122. Judge Higginbotham, by letter dated March 25, 1993, asked the parties for letters setting forth the status of the matter and the parties' respective positions preparatory to a series of meetings before him. Fibreboard Exh. 560. Fibreboard and Continental responded with such letters. Fibreboard Exhs. 561, 562.

123. As set forth in its letter to Judge Higginbotham, Fibreboard stated its views that: (i) Fibreboard and Continental should focus their attention on resolving the issues raised in Fibreboard's pending litigation in this Court; (ii) Continental should agree to the terms of the Initial Ness Motley Agreement; (iii) to the extent that there were discrete aspects of Fibreboard's litigation in this Court on which agreement between Fibreboard and Continental could not be reached -- for example, Fibreboard's prayer for a contribution bar order -- then such disputed aspects should be adjudicated by the Court on an expedited basis; and (iv) Continental should not be permitted to become involved in negotiations between Fibreboard and Plaintiffs' Counsel toward a global resolution of all of Fibreboard's present and future asbestos personal injury liabilities -- negotiations that Fibreboard said were nearing a successful conclusion -- unless Fibreboard received assurances from Continental that Continental's participation in such negotiations would not cause delay, interference or prejudice to Fibreboard. Fibreboard Exh. 562.

124. Continental's understanding was that the focus of the settlement effort was intended to be an attempt to achieve a global settlement. Tr. at 1332-33. As set forth in Continental's letter to Judge Higginbotham, Continental believed that there were several major obstacles to a global settlement

with Fibreboard, namely: (i) the Pacific II Agreement, whereby the parties to that agreement agreed to rescind the Pacific policy with the purported effect of extinguishing Continental's right to contribution from Pacific, in exchange for a payment by Pacific to Fibreboard of up to $360 million; (ii) Fibreboard's assignment settlement program, including the threat of a global resolution of Fibreboard's asbestos liabilities by means of an assignment settlement be- tween Fibreboard and Plaintiffs' Counsel without Continental's consent; (iii) obstructed communication between Continental and representatives of asbestos claimants, which Continental claimed prevented it from participating at the bargaining table; and (iv) alleged interference by Fibreboard with Continental's ability to acquire information regarding asbestos claimants asserting claims against Fibreboard. Tr. at 1333-34; Fibreboard Exh. 561.

125. Continental was also of the view in March 1993 that any global settlement with Fibreboard had to be structured as a non-opt-out class action settlement. This was a sine qua non for Continental, for several reasons. First, structuring the settlement on an opt-out basis could give the asbestos plaintiffs the equivalent of a "one-way option," in that if the Insurers were successful in the Coverage Case appeal there would likely be virtually no opt-outs from the settlement, whereas if Fibreboard were successful in the same appeal there might be a large number of opt-outs. Tr. at 1334-35. This analysis was predicated on an assessment that the likely time of decision by the California Court of Appeal in the Coverage Case would be before any date where one could anticipate that a plaintiff class would be given the right to decide whether or not to opt out of the settlement. Tr. at 1335-36.

126. Second, Continental was not willing to contribute the major portion of a multi-billion dollar settlement and give up its right to continue litigating the Coverage Case appeal -- and thereby perhaps eliminate any liability to Fibreboard -- unless it could thereby achieve certainty with respect to the magnitude of its liabilities under the insurance policy it had issued to Fibreboard. Continental thus regularly insisted that any global settlement provide it with "total peace" with respect to asbestos-related liability. Continental did not believe that it could make an accurate assessment of the ultimate liability that would be associated with those class members who would choose to opt out of a future-claimants asbestos class action such as that being contemplated.[16] The contemplated class action differed in this regard from most class actions -- such as securities fraud class actions -- where the defendant can determine with reasonable accuracy at the outset the potential value of the opted-out claims. Tr. at 324, 1336-38, 1569-72.

127. For their part, Messrs. Rice and Cox were of the view that Fibreboard and Continental had to reach an agreement resolving the differences between them before Con- tinental should be permitted to participate in global settlement negotiations with Plaintiffs' Counsel. Tr. at 1097-98. In an April 5, 1993 letter to Fibreboard's counsel, Mr. Cox stated two preconditions to Plaintiffs' Counsel's entering into global settlement negotiations. First, Mr. Cox was to be provided with a copoy of any written Fibreboard-Continental agreement that

---

[16]While experts can assess -- although with uncertainty -- the value of a broad mix of future claims based on diseases that become manifest over a long period of time, there is little or no basis on which to predict which types of claims -- more serious than average, less serious than average, or simply average -- will be presented by those individuals who might choose to opt out.

was reached, no later than April 9, 1993. And second, Continental was to advise Plaintiffs' Counsel that Continental had sufficient information to commence global negotiations. Mr. Cox further emphasized that, in his view, the original, primary focus of the negotiations before Judge Hig- ginbotham was with respect to a settlement of the Ness Motley cases. Fibreboard Exh. 563.

128. Fibreboard and Continental then engaged in extremely hard-fought, arm's-length, contentious negotiations that led to an agreement between them on April 9, 1993 (the "April 9 Agreement"). Tr. at 308-10, 1340, 1349; Fibreboard Exhs. 566, 908. Fibreboard believed that it had the right to enter into assignment settlements without Continental's consent. Plaintiffs' Counsel had agreed in principle to enter into a global settlement with Fibreboard funded by an assignment of rights against Continental and the proceeds of its settlement with Pacific. Fibreboard was thus unwilling to give up this position unless Continental agreed that it could only enter into a global settlement that would not require contribution of any of Fibreboard's non-insurance assets. Tr. at 309-12.

129. The April 9 Agreement provided, inter alia, that the parties would use their best efforts to achieve a global resolution of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims.[17] In addition, Continental agreed that it

---

[17]The April 9 Agreement expressly provided, however, that the "best efforts" clause in the agreement did not "obligate Continental to pay or obligate itself with respect to any particular amount or amounts of money or to agree to any particular term or terms in order to achieve" such a global resolution. (continued...)

would not seek to reach a global settlement without Fibreboard's participation, and that any global settlement Continental did conclude with Fibreboard would be funded entirely within Fibreboard's available insurance resources. Tr. at 309-312, 1345-49; Fibreboard Exh. 908. Such a provision -- excluding Fibreboard's non-insurance assets from any global settlement -- had been Fibreboard's corporate goal for many years and continued to be a sine qua non for Fibreboard. Tr. at 144, 1349, 1588-89. Continental also agreed to pay the monies that Pacific had agreed to pay under the Pacific II Agreement under the same conditions and as if a Final 5.2 Order had been entered. This meant that if Continental were successful in voiding the Pacific II Agreement, Continental would nonetheless stand behind the monetary obligations of that agreement. Tr. at 310; Fibreboard Exh. 908 at ¶ 6(b).

130. The April 9 Agreement achieved several important purposes for Continental. First, it prevented Fibreboard from entering into any settlements -- including any further assignment settlements -- without Continental's consent. Second, Continental obtained direct access to global negotiations with Plaintiffs' Counsel. In addition, Continental obtained certain releases from Fibreboard, including a release with respect to asbestos property damage claims. Tr. at 1344; Fibreboard Exh. 908.

131. In the April 9 Agreement, Fibreboard obtained a number of important commitments from Continental: (i) most important, an undertaking -- which Fibreboard viewed

---

[17](...continued)
Fibreboard Exh. 908 at 1, ¶ 1.

136. On the morning of April 30th, Continental made a global settlement offer to Plaintiffs' Counsel to settle all of Fibreboard's present and future asbestos personal injury claims for $2 billion face amount, to be paid over 25 years. The offer continued to be conditioned upon the settlement being structured on a non-opt-out basis, as well as an adequate contribution from Pacific. Plaintiffs' Counsel briefly considered this offer among themselves and then returned to the negotiating room, stating that they believed that they had been presented with a "take-it-or-leave-it" offer, and that they would leave it. Plaintiffs' Counsel then walked out of the meeting. Tr. at 314-16, 1100, 1352-56.

137. For a period of time thereafter, Plaintiffs' Counsel took the position that the global settlement negotiations had terminated, that the only issue for discussion was the resolution of the Ness Motley litigation, and that Judge Higginbotham's role was limited to assisting in that resolu- tion. Continental and Fibreboard took the position that global negotiations were not over, and the Judge Higginbotham should encourage the parties to continue global negotiations. Tr. at 317-19, 1101-02, 1356-57, 1538; Fibreboard Exhs. 567, 572, 574-576.

138. Judge Higginbotham convened a meeting on May 5, 1993 in New Orleans attended by Fibreboard, Continental, Pa- cific and Messrs. Rice and Cox. At that meeting, Continental urged strongly that global negotiations be continued. Mr. Rice continued to insist that global negotiations were over, as long as Continental continued to insist -- as it did at that meeting -- that any global settlement be done on a non-opt-out basis, and that there be an adequate financial

contribution from Pacific. Pacific continued to state that the Pacific II Agreement resolved its Fibreboard asbestos- related liabilities. Nevertheless, Judge Higginbotham directed Continental and Messrs. Rice and Cox to set forth in writing their positions with respect to the structure of a global settlement (opt-out or non-opt-out) and the price of any such settlement. Continental and Messrs. Rice and Cox did so, in letters dated May 12, 1993 and May 17, 1993, respectively. Tr. at 1355-58, 1370, 1538; Fibreboard Exhs. 568, 574.

139. Judge Higginbotham convened another meeting in Washington, D.C., on May 17, 1993. Following their meeting with Judge Higginbotham, Continental, Fibreboard and Messrs. Rice and Cox met to discuss a resolution of the litigation concerning the Initial Ness Motley Agreement. Although Messrs. Rice and Cox took the position that formal global negotiations had ceased, and that they had no authority to negotiate on behalf of Messrs. Kazan and Wartnick, Continental and Fibreboard continued to seek to restart global negotiations, and Mr. Wachtell indicated that he would be willing to recommend to Continental a global price higher than that offered to Plaintiffs' Counsel on April 30. Tr. at 320, 1101-03, 1373-74. The global settlement being discussed continued to assume a settlement of both present and future claims. Tr. at 324-25, 1399-1400.

140. In late May 1993, during the course of nego- tiations concerning a settlement of the Ness Motley cases, informal meetings took place among Fibreboard, Continental and Messrs. Rice and Cox in an effort to find a way to make progress on a global settlement. No avenue for progress was found. As a consequence, representatives of Continental and

as enforceable in court -- that Continental would use its best efforts to accomplish a settlement of all of Fibreboard's asbestos-related personal injury liabilities, pre-1959, post- 1959, settled, present, and future, within Fibreboard's remaining insurance resources; (ii) Continental's agreement to provide a full defense for pre-1959 cases and to pay indemnity and defense costs up to a specified limit ($95 million) for post-1959 cases; (iii) an undertaking by Continental to pay the monies Pacific had agreed to pay in Pacific II, as if a Final 5.2 Order had been entered; and (iv) a release of certain claims. Tr. at 309-12, 1344-49; Fibreboard Exh. 908.

132. Attempts by Continental during this period of time to enlist Pacific's agreement to participate in negotiations were unsuccessful. Pacific was of the view that it had entered into a binding agreement with Fibreboard that, upon entry of the court order being sought by Fibreboard in the action in this Court, would resolve its Fibreboard asbestos- related liability. Accordingly, Pacific rejected Judge Higginbotham's suggestion that it participate in global settlement negotiations. Tr. at 1349-50.

2. April 9, 1993 to August 9, 1993

133. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and once having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Continental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. Continental Casualty Co. v. Pacific Indemnity Co. and Fibreboard Corp., Civil Action No. 6:93cv

223 (E.D. Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement. Tr. at 1350; Fibreboard Exh. 329; Continental Exh.24.

134. On April 27, 1993, the California Court of Appeal notified the parties to the Coverage Case appeal that oral argument had been scheduled for June 11, 1993, with respect to a discrete group of appellate issues. The notice indicated that oral argument upon the Coverage Case appeal would be conducted in several "issue groups" (each dealing with a different group of appellate issues). The notice gave no indication, however, as to the schedule for completing the additional rounds of oral argument. Fibreboard Exh. 243. Indeed, the first notice was followed in short order by further notices from the Court of Appeal scheduling additional rounds of oral argument on the Coverage Case appeal. Continental Exh. 32; Fibreboard Exhs. 247, 248.

135. Having met the preconditions set forth in Mr. Cox's letter of April 5, Fibreboard Exh. 563, on April 29 and 30, 1993 discussions concerning a global settlement were held in Washington D.C. among Continental, Fibreboard, and Plaintiffs' Counsel. On the 29th, Herbert M. Wachtell, counsel for Continental, set forth Continental's negotiating positions, including its positions that any settlement must be on a mandatory non-opt-out basis, and that a prerequisite to any global settlement was an acceptable level of contribution from Pacific. Plaintiffs' Counsel rejected both of these positions, and insisted that Continental put a concrete economic proposal on the table. Tr. at 314, 1099-1100, 1352, 1355.

Fibreboard began discussions during June 1993 regarding the possibility of the two parties entering into a "bilateral" settlement of the insurance coverage dispute without the participation of Plaintiffs' Counsel. Several meetings were held between Continental and Fibreboard during June toward that end. By the end of June it was apparent that Fibreboard and Continental would not be able to reach such an agreement, with key issues such as price and Continental's demand of an acceptable contribution from Pacific unresolved. Tr. at 316- 17, 1375-79.

141. On June 15, 1993, representatives of Continental met with all of Plaintiffs' Counsel, including Messrs. Kazan and Wartnick, at the Caplin & Drysdale offices in Washington, D.C. Continental explained again why any global settlement would have to be structured as a non-opt-out deal that would provide Continental with certainty as to the cost of the deal at the outset. Plaintiffs' Counsel stated that they required a clearer indication of what Continental would be willing to pay in the early years of a settlement. Continental stated that it could be somewhat more flexible on price. Plaintiffs' Counsel conferred among themselves, and then -- having concluded that, for persuasive reasons, Continental simply would not proceed on an opt-out basis -- informed Continental that they would be willing to consider a Rule 23(b)(1)(B) global class action settlement if Continental could articulate the legal basis for such a structure, and on the understanding that the global settlement would cost Continental more if done on a non-opt-out basis. Plaintiffs' Counsel left Continental's representatives with a list of questions to which they would require responses. Tr. at 392-93, 657-58, 1125-27, 1381-84, 1392-93, 1444-50, 1572; Class Plaintiffs Exh. 1015 at

1-2. Again the contemplation of the discussion was a global settlement of both present and future claims. Tr. at 324-25, 393, 1399-1400.

142. During June and July 1993, negotiations with respect to the Ness Motley cases continued among representa- tives of Continental, Fibreboard, and Ness Motley. Tr. at 1103-05. Mr. Rice insisted on a settlement price of $13,000 per pre-1959 claim. Tr. at 1394-95.

143. Notwithstanding the April 9 Agreement between Continental and Fibreboard, Fibreboard was still contractually obligated to procure a court order validating its right to enter into assignment settlements, and Continental faced the prospect that such an adjudication would require it to pay out on assignment agreements at case values it considered to be markedly inflated. Therefore, Continental desired to renegotiate these agreements as three-party deals, and Fibreboard and Continental created a national settlement program to do so. Tr. at 312-13, 1395-96.

144. Under that settlement program, representatives of Fibreboard and Continental met with various plaintiffs' counsel across the country with whom Fibreboard had entered into assignment settlements without Continental's consent, and jointly sought to convert the assignment settlements into "three-party" settlements to which Continental was a party. As part of the national program, Continental and Fibreboard also met with plaintiffs' counsel who had no assignment settlements in an effort to settle their cases as well. Tr. at 1395-97. All such contemplated three-party settlements involved payment of part of the settlement in cash, with the

balance contingent on either a settlement of the Coverage Case or a litigated loss of the Coverage Case by Continental. Tr. at 321, 1395-96, 1408-09. Ultimately, the renegotiated settlements reflected lower nominal values than the assignment agreements they replaced due to the cash component. Even so, the assignment program invariably resulted in renegotiated values that were still higher than Fibreboard's historical settlement averages. Tr. at 321-23, 522, 633, 931-32, 1082- 84, 1102-05.

145. During the course of this settlement program it became apparent that other plaintiffs' counsel were reluctant to enter into three-party settlements without an established standard for such a settlement, lest they find that they had entered into a less advantageous settlement for their clients. Accordingly, the conclusion of a three-party settlement of the Ness Motley cases came to be viewed as essential to concluding other three-party settlements because it could provide an acceptable benchmark. Tr. at 1396-97.

146. By early July the parties to the Ness Motley negotiations were close to agreement on price, as well as the size of the cash component. The balance would be contingent on either a settlement of the Coverage Case or a loss by Continental of the Coverage Case. Tr. at 1128, 1398.

147. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Conti- nental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Tr. at 324-25, 1659-61. Accordingly, he suggested

that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases -- which could serve as the model for settling the presently pending Fibreboard cases -- should precede further global negotiations. Tr. at 1398- 1400.

148. In late July 1993 the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final issue group of the appeal had been scheduled by that court for August 27, 1993. Tr. at 329, 1400-01; Fibreboard Exh. 248. The parties to the appeal (and, through them, Plaintiffs' Counsel) thus knew that the appeal would be finally submitted to the court for decision on that date. Indeed, the belief was held among at least some of the parties to the global negotiations that the court might issue its decision immediately following the conclusion of oral argument. Tr. at 329.[18]

149. The parties had agreed on July 13 that the appropriate way to proceed was to conclude the renegotiation of the Initial Ness Motley Agreement as a three-party agreement, and that this process had to take precedence over continued negotiation of a global settlement. Although Continental had been somewhat successful in slowing down the course of the Fibreboard v. Continental litigation in this Court, Messrs, Rice and Cox were actively seeking to have it proceed to trial promptly (as was Fibreboard, which was contractually bound to join them in that effort). Thus Continental faced the

---

[18] In any event, provisions of the California State consti-tution made it highly likely that the California Court of Appeal would issue its decision within 90 days following the August 27 oral argument. Constitution of the State of California, Art. VI, § 19.

very real prospect the trial would go forward promptly if no three-party settlement of the Ness Motley cases were reached. However, Continental deemed it tactically very undesirable to challenge the Final 5.2 Order being sought by Fibreboard -- which order had been structured in the Initial Ness Motley Agreement to bar not only contribution claims with respect to Ness Motley cases but as to all asbestos claims -- in a context where such an order was a condition precedent to a settlement of over 20,000 asbestos cases. Tr. at 1386-87, 1400-06.

150. Moreover, Continental had decided that as long as Pacific had the prospect of obtaining approval of a bar order against Continental at a cost of only $330 million, there was no realistic possibility of bringing Pacific to the bargaining table to bear what Continental felt was Pacific's fair share of a global settlement. Accordingly, Continental concluded that the only way to reach a global settlement and avoid a very damaging loss in Fibreboard v. Continental was to negotiate first a new settlement of the Ness Motley cases. Tr. at 1350, 1385-87, 1400-07.

151. With the continued active assistance of Judge Higginbotham, and after hard-fought, arm's length negotiations, on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. Tr. at 321-23, 1128-29, 1402-04; Fibreboard Exh. 586.

152. The Substitute Ness Motley Agreement, compared to the Initial Ness Motley Agreement, reflected a reduction in the per-claimant settlement amounts, an increase in the number of cases settled, and the modification of numerous other pro- visions of the original agreement. The Substitute Ness Motley Agreement also provided for counsel participating in the agreement to recommend to their future asbestos clients an offer to settle their claims against Fibreboard on the same terms as those offered to settle present claims. The Substitute Ness Motley Agreement did not obligate any future claimants to accept those settlement terms and expressly provided for the full representation by Ness Motley of any person who rejected those settlement terms. In addition, Fibreboard and Continental were not required to offer those terms if more than a certain percentage of the Ness Motley future claimants elected to reject the terms. Tr. at 321-33, 1402; Fibreboard Exh. 909.

153. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval. Tr. at 1407, 1413; Fibreboard Exh. 588.

3. August 9, 1993 to August 27, 1993

154. After the conclusion of the Substitute Ness Motley Agreement, Judge Higginbotham addressed a letter to this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider

directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." Fibreboard Exh. 586.

155. By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plain- tiffs' Counsel to act as negotiating counsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Fibreboard Exhs. 588, 589. The negotiating parties did not in any way deem themselves to be bound in this respect and, indeed, in negotiations subsequent thereto active consideration was given to agreeing upon a combined global settlement of both present and future claims. Tr. at 325, 1426-27.

156. Although Messrs. Kazan and Wartnick were orally designated by this Court to participate in the global settlement negotiations under the condition that they first notify the Court that all of their existing claims against Fibreboard had been resolved, the Court's formal order contained no such condition. This appointment included, in addition to Plaintiffs' Counsel, Mr. Robert E. Sweeney, Esq. Tr. at 1407-12; Fibreboard Exhs. 588, 590.

157. Immediately upon the signing of the Substitute Ness Motley Agreement, Continental requested that Continental v. Pacific and Fibreboard be set for trial as soon as possible. Now that it could be separated from the issues that would have been involved in litigating the approval of the Initial Ness Motley Agreement, Continental was willing to have the

issue of the validity of a Final 5.2 Order decided. Moreover, Continental wanted an immediate trial of its case so that Pacific would be motivated to join the negotiations before the California Court of Appeal rendered a decision in the Coverage Case. Fibreboard Exh. 588.

158. At the same time, this Court requested Judge Higginbotham to continue to serve as Settlement Facilitator (i) with respect to the pending Continental v. Pacific and Fibreboard litigation; and (ii) if Judge Higginbotham were agreeable, with respect to the negotiations for a global future claims-only settlement. Fibreboard Exh. 588.

159. Continental, Fibreboard and all of Plaintiffs' Counsel met later on the evening of August 9, 1993 at the Adolphus Hotel in Dallas, and intensive meetings continued through August 12, 1993. Although the parties present at those meetings did reach an agreement to use a negotiating benchmark of 186,000 future claims against Fibreboard, these meetings produced no price agreement because price negotiations were difficult, given Continental's position that any settlement would require an "acceptable" level of contribution from Pacific, and Plaintiffs' Counsel's unwillingness to enter into such a contingent settlement. The negotiations for a global settlement during those meetings were not limited to a future claims-only deal, but continued to contemplate a global that would include all claims, both present and future. Indeed, the negotiations concluded with an offer by Plaintiffs' Counsel to price three different settlement alternatives: an all-inclusive global settlement, a settlement of unsettled present and all future claims, or a future claims-only global settlement. Tr. at 984, 1184-85, 1414-20.

160. During the Spring and Summer of 1993, at the same time that Plaintiff's Counsel were in intense discussions with Fibreboard and the Insurers, they and other representa- tives of asbestos victims were involved in resolving the fi- nancial difficulties facing the Manville trust. As part of the Manville negotiations, which involved dozens, if not hundreds, or lawyers across the country representing asbestos claimants as well as the Manville trust and other asbestos defendants, the participants developed what they considered to be fair values for the Manville settlement share of claims against that trust. The claims values thus developed for the Manville trust were congruent with the values developed by Plaintiffs' Counsel in Linscomb. Tr. at 1130-33.

161. The average settlement values for the Manville settlement share by disease developed in 1993 were as follows:

Mesothelioma	$200,000
Lung Cancer	$75,000
Other Cancers	$40,000
Asbestosis	$37,500
Pleural Disease	$12,000

Tr. at 1131.

162. In connection with the Linscomb and Manville negotiations, Plaintiffs' Counsel developed an understanding of the respective settlement shares of all asbestos defendants. Generally, Manville's share was 30% to 33%, while ACF members collectively bore responsibility for 80% to 85% of the remainder. Tr. at 1133. Plaintiffs' Counsel learned that Fibreboard, an ACF member, was responsible for approximately

12% of the ACF liabilities. Thus, by arithmetic, Plaintiffs' Counsel were able to isolate a settlement share range for Fibreboard as between 6% and 7% of the total (80% x 70% x 12%), and to apply that range to the average case settlement values by disease that they had developed. Tr. at 1133. That calculation produced the following Fibreboard settlement share ranges:

Disease	Total Liability			Fibreboard Share
Manville share	(30%)	(33%)	(6%)	(7%)
Mesothelioma	600,000	660,000		36,000 to 46,200
Lung Cancer	225,000	247,500		13,500 to17,325
Other Cancer	120,000	132,000		7,200 to 9,240
ALD I	112,500	123,750		6,750 to 8,662
ALD II	36,000	39,600		2,160 to 2,772

Tr. at 1134-36.

163. During global negotiations in 1993 with Fibreboard and the Insurers, Plaintiffs' Counsel based their negotiating positions on the average settlement values developed in Linscomb and developing in Manville, and also compared them with values reflected in the Initial Ness Motley Agreement and evolving in the negotiations of the Substitute Ness Motley Agreement. Tr. at 1129-33, 1157.

164. Based on the foregoing, the Court finds that it was reasonable from the standpoint of members of the Global Health Claimant Class for Plaintiffs' Counsel to use these settlement values in the global settlement negotiations during 1993.

165. On August 16 and 17, 1993, there was a meeting in Atlanta of the Ness Motley-affiliated law firms (as well as other attorneys) to discuss, among other things, the recently concluded Substitute Ness Motley Agreement and the status of the Fibreboard global negotiations. The meeting was attended by all of Plaintiffs' Counsel. Stephen Snyder (representing Fibreboard) and Meyer G. Koplow (representing Continental) attended to address the meeting on the Coverage Case. Informal discussions among the negotiators then present made it apparent that a solution to the Pacific issue needed to be found or a global agreement would not be reached. Tr. at 1452-53, 2448. Although the parties recognized that they should endeavor to reach a settlement by August 27, Continental's action against Fibreboard was not scheduled to commence until September 13, 1993. Tr. at 1420-21, 1458-60.

166. On August 18, 1993, Continental and Pacific representatives each met with Judge Higginbotham in Dallas. Continental was seeking to obtain an agreement from Pacific to share in the cost of a global settlement so that the issue of an acceptable level of contribution from Pacific could be removed as an obstacle to a deal. Pacific maintained its position that it would not participate in global settlement negotiations. Tr. at 1422-23.

167. Having failed to bring Pacific to the negotiating table, Mr. Koplow met with Messrs. Rice and Cox on August 20, 1993 in Charleston to discuss a structure for a global settlement without up-front participation by Pacific, which would potentially leave Pacific with exposure to massive ongoing liability. Such an alternative structure would have entailed Continental in the first instance contributing more than

its equitable share of a global settlement, with the hope of eventually recouping its overpayment. At the August 18 meeting with Judge Higginbotham, Continental had exposed its alternative structure to Judge Higginbotham to solicit his views and reactions. Although Messrs. Rice and Cox pressed for a Continental commitment to do such a deal, Mr. Koplow stated that he would require until the night of Sunday, August 22 -- when negotiations were set to resume in Philadelphia --either to bring Pacific to the table or to commit to proceed on a deal without Pacific. Tr. at 1421-22, 1424.

168. High-level discussions between Continental and Pacific thereupon took place over the weekend of August 21 and August 22, 1993 in New York. On Sunday, August 22, Continental and Pacific reached a memorandum agreement, subject to the approvals of their respective boards of directors (which subsequently were given), to resolve the dispute between them with respect to equitable contribution rights. (This agreement was subsequently superseded by an agreement between them dated October 12, 1993.) Tr. at 1422-25; Continental Exhs. 20, 21.

169. Pursuant to that agreement, Pacific agreed to share with Continental the costs of funding a global settlement of future asbestos-related personal injury claims against Fibreboard, on the basis of Continental paying approximately 65% of the total amounts that would be required, with Pacific being responsible for the remaining 35%. They also agreed to share the costs of satisfying liabilities on any existing asbestos-related personal injury claims, pursuant to a separate provision of that agreement. In the event no global settlement or other resolution of the insurance coverage dispute was

reached or the requisite court approvals were not obtained, Continental and Pacific agreed that the parties would continue to contribute on the same shared basis toward satisfying Fibreboard's liabilities to asbestos personal injury claimants to the extent that either or both of them were finally determined in the Coverage Case to be responsible for such liabilities. Continental Exhs. 20, 21.

170. As scheduled, global negotiations resumed in Philadelphia at the Four Seasons Hotel on the evening of Sunday, August 22, 1993. Fibreboard, Continental and Plaintiffs' Counsel, as well as Mr. Sweeney, were present. Everyone was informed of the Continental-Pacific agreement and the negotiations proceeded. Tr. at 329-30, 409-10. Continental indicated that the Insurers' preference was to negotiate a global settlement of both present and future claims, and asked Plaintiffs' Counsel to price an all-inclusive global settlement. Although Plaintiffs' Counsel expressed a willingness to do so ten days earlier in Dallas, they now stated that they were unwilling to do any global deal that included present cases. The reason given was an inability to satisfy themselves as to the remaining Fibreboard exposure on unsettled present cases. The quality and quantity of information that existed as of August 22, 1993, were not adequate for Plaintiffs' Counsel to be willing to price a global settlement including these claims.[19] Thus, the

---

[19]Plaintiffs' Counsel's position in this regard is understandable. It is apparent from the testimony that neither Fibreboard nor Continental was in a position to fix with any degree of precision the number or source of unsettled present claims against Fibreboard. Tr. at 713-15, 719-20, 2677-79; Fibreboard Exh. 827. Any significant underestimation of present cases would have a much larger effect on a settlement fund than underestimates of claims that would

(continued...)

parties proceeded to focus solely on a future claims-only global settlement. An offer of $1.3 billion from Continental was rejected by Plaintiffs' Counsel. Tr. at 329-31, 1426-27, 1442-45, 1573-74.

171. Throughout the negotiations following the April 9 Agreement, Plaintiffs' Counsel had raised the issue of the value of Fibreboard's equity in any settlement where there would be no further recourse to Fibreboard or the Insurers. On the night of Monday, August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. Continental viewed the $200 million amount of the increase as approximately equivalent to the maximum value of Fibreboard, and offered it to compensated for the fact that Fibreboard's non-insurance assets were not available due to the April 9 Agreement. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Tr. at 1445-50. Indeed, the Insurers' counsel had no authorization from their clients to agree to a higher amount, and the Continental-Pacific agreement reached the previous Sunday had as its express premise that the amount needed to reach a global settlement was $1.5 billion. Tr. at 1444-47, 1462, 1471; Continental Exh. 20.

172. Even though Plaintiffs' Counsel had previously determined that they would settle if they could get $1.5 billion, Tr. at 1014-16, the Continental-Pacific offer was likewise rejected, with some of Plaintiffs' Counsel walking out

---

[19](...continued)
appear over a period of years.

of the meeting. Negotiations broke off. It was, however, agreed that one, final, last-ditch effort would be made to reach agreement before the submission of the Coverage Case appeal on Friday, August 27, 1993. The parties agreed to convene in Tyler, Texas in the early afternoon of Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. Tr. at 331-32, 1444-51. The Insurers viewed this as yet another effort by Plaintiffs' Counsel to extract every last cent from the Insurers' pockets. Tr. at 1464-65.

173. The global settlement discussions reconvened in the Court's chambers on the afternoon of August 26, 1993. All parties were represented. This was the first direct involvement of this Court in these discussions. The parties outlined their positions and the Court spent several hours listening to parties state their unwillingness to change their positions. In particular, Plaintiffs' Counsel sought to obtain from Fibreboard a contribution to the settlement of cash beyond the money to be paid by Fibreboard's insurers. No progress was made during several hours of those discussions. Tr. at 332-33, 1457-65.

174. Late in the afternoon on August 26, as the Courthouse was closing, the principal negotiators for each party were driven to the Court's home for further discussions. After several more hours of discussion, Continental's counsel agreed to recommend to Continental an increase of $25 million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. Tr. at 333-35, 1465-73. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached. Tr. at 1473-74.

175. The evidence is uncontroverted that throughout the negotiations conducted on August 26 and August 27, 1993, the Court's role was the normal role of a court assisting the parties in reaching an agreement, if they could do so. Tr. at 752-54, 1014-18, 1279-85, 1465, 1469, 2450-51.

176. Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute. Tr. at 1285, 1474-77.

177. Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the Coverage Case that would become operative if for any reason a global settlement failed to achieve final court approval. Tr. at 1052-53, 1181-83, 1632. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the Coverage Case while a global settlement was pending approval in the courts. Tr. at 707-08, 913-14, 115354. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement.

This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. Tr. at 332-36, 1474-78. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement, and, late in the afternoon of August 27, 1993, Fibreboard reluctantly acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. Tr. at 334-36, 592-94, 1379-80. The backup settlement is what is now referred to as the "Trilateral Settlement."

178. During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the Coverage Case appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27 after this Court advised the parties that it would soon close for business was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement"). Tr. at 1480-81.

179. The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than

January 1, 1994.[20] In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve either through litigation or settlement -the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 17, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount -not as of then determined -would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust. Fibreboard Exh. 592.

180. In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information including information that would otherwise be protected by privilege or trade secret confidentiality -- as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the

---

[20]The Global Settlement would be subject to final court approval. Upon such approval, the original amount in the escrow account, plus any accrued interest thereon, would be transferred into a settlement trust (the "Trust"). Should the Global Settlement fail to receive final court approval, the principal and interest in the escrow account would revert to the Insurers. Fibreboard Exh. 592.

were described to this Court on September 9.[21] Tr. at 1487. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. Tr. at 1487; Complaint, Dkt. No. 1 (Sept. 9, 1993); Motion for Preliminary Injunction and Temporary Restraining Order, Dkt. No. 7 (Sept. 9, 1993); Joint Motion for Provisional Class Certification, Dkt. No. 12 (Sept. 9, 1993). This Court thereafter granted the motions for provisional class certification and for a temporary restraining order. Order Granting Motion for Class Certification, Dkt. No. 16 (Sept. 9, 1993); Temporary Restraining Order, Dkt. No. 11 (Sept. 9, 1993).[22]

186. Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the

---

[21]The amendments to the April 9 Agreement were ultimately memorialized in a document entitled "Supplemental Agreement," which was executed on October 12, 1993. Tr. at 1488.

[22]On September 16, 1993, this Court granted the Insurers' motion seeking an extension of the temporary restraining order. Order Granting Motion to Extend Time of TRO, Dkt. No. 19 (Sept. 16, 1993). On September 27, 1993, this Court held a hearing on the Insurers' motion for a preliminary injunction enjoining the Global Health Claimant Class from commencing litigation against Fibreboard or the Insurers. Continental Exh. 17. On September 28, 1993, this Court granted the motion for a preliminary injunction. Preliminary Injunction, Dkt. No. 29 (Sept. 28, 1993).

"Trilateral Settlement Agreement") on October 12, 1993. Tr. at 336-38, 1482-88; Fibreboard Exh. 910. On that same day, an amended Continental-Pacific agreement was also signed setting forth the details of the Insurers' sharing arrangements, Continental Exh. 21, as was the Supplemental Agreement. Tr. at 1488.

187. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global settlement in principle had been put on the record on August 27, 1993, hundreds of detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In additions, the "Third-Party Claimant Class Settlement" was negotiated during this time period. Tr. at 402-03, 1489, 1496-97.

188. The negotiations on the written global agreement were, for the most part, a slow and very contentious process, during which disagreements with regard to a number of significant issues arose. Tr. at 411, 1489. In particular, there were disputes among the parties regarding, inter alia: (i) the scope of the claims against the Insurers that would be extinguished by the global agreement, as to which the Insurers' position was that the Fibreboard insurance policies would be disposed of and the Insurers would thereby receive "total peace"; (ii) the meaning of the term "total peace" itself, which term had been used by counsel for the Insurers when the parties originally announced the global agreement in principle in open court on August 27, 1993; (iii) which party or parties were to

bear the risk of liability for claims that for some reason could not be extinguished; (iv) the indemnity obligations of Fibreboard and of the Trust to be created as part of the Global Settlement; (v) the process for amending the global agreement in the future; (vi) how to resolve issues related to claims asserted by Plant Insulation Company; and (vii) the operation of the Trust, including investment restrictions and spendthrift provisions. Tr. at 1489-96.

189. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement and now referred to as the "ThirdParty Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993. Tr. at 1496-97; Fibreboard Exh. 912.

VI. KEY SETTLEMENT TERMS[23]

190. The Global Settlement Agreement and the Trilateral Settlement Agreement each operate to settle the Coverage Case and to extinguish all liability of the Insurers under or in connection with the policies. The two agreements operate, however, to create very different procedures for

---

[23]Because it is necessary to do so in order to explain the settlements under consideration, the Court has summarized various portions of the detailed agreements before it. There is no dispute before the Court about the meaning or intended operation of the language of these agreements, and these provisions are not before the Court for judicial construction. The Court does not intend any portion of these findings, including the summaries of the agreements which appear throughout, to be preclusive if disputes about the meaning or operation of these agreements should arise.

handling the proceeds from the settlement of the Coverage Case, with very different likely economic effects on the class members. Fibreboard Exhs. 910, 912.

A. The Global Settlement

191. The Global Settlement Agreement -which is subject to court approval - provides a structure for the handling of the proceeds of the Coverage Case settlement and the additional funds to be contributed by Fibreboard. The intentions of the parties to the Global Settlement Agreement (the "Settling Parties") in creating the procedure for handling the Coverage Case settlement proceeds are patent on the face of the Global Settlement Agreement. They are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid first; and (v) to protect the Trust's assets from unduly risky investments. Tr. at 1493-96, 1521-24; Fibreboard Exh. 912 (Global Settlement Agreement).

192. The Global Settlement Agreement settles all claims for asbestos-related personal injury or death against

contain each and every one of certain specified provisions. These additional requirements are that the judgment must:

> declare with respect to the claims of both the Global Health Claimant Class and Global Third-Party Claimant Class that the settlement is fair, reasonable and adequate and was entered into in good faith; that the members of both classes have received adequate notice of the settlement; and that Global Health Claimant Class members have been adequately, professionally and ethically represented by class counsel; --approve the releases and indemnities contained in the Global Settlement Agreement, and the provisions in the Global Settlement Agreement and TDP for the resolution of the Global Third-Party Claims; --permanently enjoin Fibreboard from asserting against Continental or Pacific any claim released or discharged under the Global Settlement Agreement, and permanently enjoin any Global Health Claimant Class member or Global Third-Party Claimant Class member from asserting against Fibreboard, Continental, or Pacific any claim released or discharged under the Global Settlement Agreement; --discharge Fibreboard, Continental and Pacific from any further liability with respect to any Global Health Claimant Class Member Claim[25] or Global

---

[25]The formal definition of the "Global Health Claimant Class Member Claim" is set forth in the Glossary to the Global Settlement Agreement, (continued...)

Third-Party Claim; declare to be fair, reasonable and non-collusive the provision in the Global Settlement Agreement under which Fibreboard and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the policies, except as specifically assumed or preserved under the various settlement agreements between them; -- declare that only payments of funds pursuant to a Global Health Claimant Class member's individual settlement with the Trust, and not entry into or final approval of the Global Settlement Agreement, shall trigger the notice, approval and forfeiture provisions on the Longshore and Harbor Workers Compensation Act and any similar provisions of state and federal workers' compensation laws;--order all Global Health Claimant Class Member Claims, except for punitive or exemplary damages, which are not allowed and will be barred, directed to the Trust for disposition pursuant to the Trust Agreement and TDP;--order the parties to implement the Global Settlement Agreement; --order dismissal of this action, including all of the Global Health Claimant Class Member Claims (including all punitive and exemplary damage claims) against Fibreboard, Continental and Pacific, on the merits, with prejudice to reassertion and without costs; --

---

[25](...continued)
Fibreboard Exh. 912 (Exh. A), under the term "Class Member Claim."

> determine and award the fees and expenses of counsel appointed to represent the classes; and --retain exclusive jurisdiction to: (a) enforce the Global Approval Judgment; (b) resolve any disputes with respect to the performance or interpretation of the Global Approval Judgment or Global Settlement Agreement; (c) adjudicate any attempt to challenge the Global Approval Judgment; and (d) oversee the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and TDP. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

196. For the Global Settlement Agreement to be finally effective there must also be a final, nonappealable order, judgment or decree of a court either approving or disapproving the separate Trilateral Settlement Agreement. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

197. The Global Settlement Agreement contains a number of provisions to deal with the possibility of a person or entity seeking to attack the Global Settlement Agreement subsequent to its final approval. Thus, the agreement provides that the Trust will indemnify Fibreboard, Continental and Pacific against any costs, fees, claims, liabilities, settlements or judgments incurred or occurring after the entry of Global Approval Judgment and resulting in any way from the assertion against any of them of any Global Health Claimant Class Member Claim or any Global Third-Party Claim, including any claim attacking the validity or enforceability of Global

Approval Judgment. Moreover, the agreement provides that, upon entry of Global Approval Judgment, Fibreboard will indemnify Continental and Pacific against any and all costs, fees, claims or liabilities relating in any way to claims arising from the exposure of a Global Health Claimant Class member to asbestos-containing products for which Fibreboard may be legally liable, including those attacking the validity or enforceability of Global Approval Judgment, except for (i) defense fees and costs directly attributable to such an attack, and (ii) costs, claims or liabilities that the Insurers have specifically undertaken to pay under the various settlement agreements. As to claims against Fibreboard that would not be covered by this indemnity, such as claims unrelated to asbestos, and that could be claimed to give rise to a direct action against the Insurers, Fibreboard agreed to reasonably and diligently defend and promptly pay such claims so as to preclude any such direct action claims. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.7, 2.8.

198. The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third-Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third-Party Claims are obtained. The Global Settlement Agreement contains provisions that deal with the possibility of the Court otherwise being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-

settlement amount, which fees would not be paid out of the Trust's funds. Fibreboard Exh. 592.

181. As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and provided funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved. Fibreboard Exh. 592.

4. August 27, 1993 to December 23, 1993

182. On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Although there had been an apparent agreement on the price term for the Trilateral Settlement on August 27, the parties did not have the same understanding of the agreement, and a week of difficult and contentious negotiations brought no resolution of their differences. Tr. at 336-38, 1482-85.

183. On September 8 and the morning of September 9, 1993, Fibreboard and the Insurers engaged in pressured and contentious negotiations in a further attempt to reach agreement on the terms of the Trilateral Settlement. Due at least in part to the pressure of the scheduled appearance before this Court, on the afternoon of September 9 Fibreboard and the Insurers agreed to submit to their clients for consideration a pricing formula that neither side would attempt to modify, i.e., the decision to be made with respect to the deal was to be either affirmative or negative. The formula provided for a total price of $2 billion. Tr. at 1485-86.

184. Fibreboard had believed that by entering into the Trilateral Settlement it would be settling with the Insurers solely with respect to its asbestos-related liabilities. Continental, however, believed that the Trilateral Settlement resulted in a complete resolution of all liabilities under the policies: in effect, a complete policy buyout. After extensive, hard-fought negotiations on this point, Fibreboard acceded to Continental's position. Tr. at 336-37. In addition, Continental insisted that Fibreboard agree that the signing of a global settlement agreement - whether or not such agreement was finally approved by the courts - discharged all of Continental's obligations under the April 9 Agreement to use its best efforts to obtain a global settlement. Fibreboard also acceded to this demand. Tr. at 337-38.

185. The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement,

Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class. Such claims include, without limitation, any and all asbestos-related claims for (i) personal injury, damage or death, and all forms of mental or emotional harm; (ii) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children or other relatives, whatever such claims are called, including, without limitation, wrongful death or survival actions; (iii) punitive, aggravated or exemplary damages of any sort; and (iv) all claims arising directly or indirectly from any of the claims described in (i) through (iii) above, including direct action claims against the Insurers or any asbestos-related personal injury claims in which it is claimed that coverage is provided by any of the insurance policies issued by Continental or Pacific to Fibreboard. Fibreboard Exh. 192 (Global Settlement Agreement) at § 2.1.

193. Upon establishment of the Trust, all asbestosrelated personal injury and death claims of members of the Global Health Claimant Class against Fibreboard, Continental or Pacific under or in connection with the insurance policies will thereafter be directed to the Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). Fibreboard Exh. 912 (Exh. B, Annex A (TDP)).

194. Pursuant to the Global Settlement Agreement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos-related personal injury or death claim. In addition, the Global Settlement Agreement contains an agreement between Fibreboard and the Insurers that the

Insurers are discharged from any and all obligations (whether direct or indirect) under or in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except of obligation specifically assumed or preserved in the various agreements between them. The claims that are subject to that agreement between Fibreboard and the Insurers include asbestos claims other than personal injury and death claims as well as nonasbestos-related claims, notwithstanding that persons or entities who may seek to assert such claims against the Insurers may not be members of either the Global Health Claimant Class or the Global Third-Party Claimant Class. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.2, 2.5, 2.6; Tr. at 395.

195. As noted above, transfer of the funds from the escrow account to the Trust will not occur until there has been final court approval of the Global Settlement Agreement, and entry of "Global Approval Judgment" as defined therein. Global Approval Judgment means one or more final, nonappealable judgments, order or decrees in a proceeding or proceedings in which Fibreboard, the Insurers, the Global Health Claimant Class members and all persons having or who may have Global Third-Party Claims[24] have been made parties, either directly or in a representative capacity, which, among other things, approves the terms and provisions of the Global Settlement Agreement and the Trust Agreement and TDP. In addition to such approvals, Global Approval Judgement must

---

[24]The formal definition of "Global Third-Party Claim" is set forth in the Glossary to the Global Settlement Agreement, Fibreboard Exh. 912 (Exh. A), under the term "Third Party Claim."

party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 6.2, 6.3.

198A. The Provisions of the Global Settlement Agreement require a discharge of and injunction against Global Third-Party Claims. Two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, filed objections based on the Eleventh Amendment to the United States Constitution, arguing that they are immune from the jurisdiction of the United States district courts absent their consent, and therefore could not be bound by the settlement. During the course of the fairness hearing, the Court expressed the view that such an objection appeared to be well taken. Tr. at 338-339. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Agreement") as of May 15, 1995. The Third Amendment, among other things, amends section 6.3(B) of the Global Settlement Agreement to provide that, in the event that the necessary discharges and injunctions against any Global Third-Party Claims cannot be obtained because it is shown or agreed among the Settling Parties that the Court lacks jurisdiction to enter such discharge or injunction, then Global Health Claimant Class members will reduce judgments in their favor against the holder of such Global Third-Party Claims in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law. The Settling Parties have agreed that the fifty states of the United States (and their governmental

units and divisions entitled to immunity under the Eleventh Amendment), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction.

198B. Pursuant to Court Order, the Settling Parties disseminated notice of the Third Amendment to all persons who were sent individual notice previously. No intervenor filed objections, nor did the Court receive any other written objections of substance. The subject of the Third Amendment came on for hearing, after notice, on June 20, 1995. No one appeared to object to the Third Amendment as it relates to the Eleventh Amendment and sovereign immunity points. The Court finds that the Third Amendment provisions calling for reduction in judgment respecting those Third-Party Claims of state and foreign governments (and their units and divisions) described in the preceding paragraph are fair and reasonable and necessary to avoid risk of failure of the Global Settlement Agreement through inability to obtain the necessary discharges of and injunctions against those Global Third Party Claims.

199. Fibreboard and the Insurers considered it important for several reasons that the Trust be structured so that it would be in the best position possible to provide compensation to asbestos claimants in the future, and to do so in a fair and equitable manner. First, they were aware of the experience of other trusts established in the mass tort contest, and especially the asbestos context, in which the interests of later claimants against the trust were not protected as well as the interests of earlier claimants. Second, they wanted to take into account the possible effect that creating a fund in excess of $1.5 billion would have in generating additional claims. Third, they

sought to minimize the likelihood that the Trust would be exhausted before compensating all claimants, causing future claimants to assert claims directly against Fibreboard and the Insurers. Finally, the parties wanted the Global Settlement - including the structure of the Trust and related TDP and spendthrift provisions - to be recognized as fair by class members and the plaintiffs' bar, as well as to be adjudicated as fair by the Court. Tr. at 1494-96, 1498-1500.[26]

200. The TDP negotiated by the Settling Parties provides the structure for the handling of claims against the Trust and equitably distributing Trust assets to claimants. The TDP mandates that claimants first seek to settle with the Trust. If that does not result in the disposition of the claim, the claimant must first proceed to mediation and then arbitration. If the claimant has not achieved an acceptable resolution of the claim, he or she may then try the claim in the tort system, subject to the overall limit of $500,000 per claim. Punitive damages and prejudgment interest are not available to any claimant against the Trust. Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten. Fibreboard Exh. 912 (TDP) at §§ C, D, F; Tr. at 1521-27.

---

[26]The Settling Parties have not, however, represented that there is any guarantee that the funds in the Trust will in fact be sufficient to compensate all future claimants. To the contrary, they -and the Insurers in particular -have emphasized the uncertainty that exists in this regard. Tr. at 1500-02, 2241-60.

201. In order to make certain that some assets will always be available to claimants who assert claims against the Trust years into the future, the TDP contains spendthrift provisions that limit the proportion of Trust assets that can be paid in any one year. These limits leave some flexibility to the Trustees, but they operate to prohibit the exhaustion of Trust assets far into the future. Fibreboard Exh. 912 (TDP) at §§ E, F; Tr. at 1531-32. The Court finds that the Settling Parties adopted these limits as a reasonable attempt to ensure that funds would be available to pay future claimants.

202. Inasmuch as the Trust is limited in the amounts that can be paid to claimants in any given year, it was necessary to adopt a mechanism to distribute the Trust funds available in any given year in the event that those funds are insufficient to pay all claimants. The Settling Parties agreed upon a system in which claimants suffering from more serious disease are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first. Fibreboard Exh. 912 (TDP) at § F; Tr. at 1521-22.

203. Based on all of the evidence -- and particularly the testimony of Messrs. Snyder, Wartnick, Kazan, Cox and Koplow, which this Court finds to be credible -this Court finds that the Global Settlement was the result of extremely hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would

actually be reached. The Court further finds that the record contains no evidence of collusion, and that the Global Settlement amount of $1.535 billion is well within the range of those values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it. Findings of Fact ¶¶418-446. The Court finds that it is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement. This Court finds, based on the overwhelming credible evidence, that the Global Settlement is fair, reasonable and adequate.

204. On December 30, 1993, pursuant to Paragraph 3 of the Escrow Agreement, Fibreboard Exh. 912 (Exh. D), the Insurers transferred $1.525 billion to an escrow agent. On June 14, 1994, the Insurers executed an interpleader bond, agreeing therein to bind themselves to further appropriate orders of this Court concerning distribution of the fund. On June 16, 1994, this Court approved the form of the interpleader bond. The Insurers have complied with the terms of the interpleader bond and the Escrow Agreement. Tr. at 1542-43; Continental Exh. 26; Order, Dkt. No. 226 (June 16, 1994).

B. The Third-Party Claimant Class Settlement

205. A settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representatives of the Global Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement

Agreement. The Third-Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific. Fibreboard Exh. 912 (Exh. C).

206. The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgement shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP. Fibreboard Exh. 912 (Exh. C) at § II.

207. Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgement against a Global ThirdParty Claimant Class member, the class member receives a reduction of any judgment subsequently entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. For example, where state law provides for a pro tanto (i.e., dollar-for-dollar) set-off, any judgment against a Global Third-Party Claimant Class member will be reduced by the amount the personal injury

claimant received from the Trust. Fibreboard Exh. 912 (TDP) at § H1; Tr. at 2283-84.[27]

208. Second, where a personal injury claimant exhausts the Trust process and litigated against the Trust in the tort system, and also files suit against a Global ThirdParty Claimant Class member, the class member likewise receives a judgment reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Fibreboard Exh. 912 (TDP) at § H3; Tr. at 2285-86.

209. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust. (There is one exception: if the class member were not satisfied with the Trust's offer, it - unlike a personal injury claimant against the Trust - would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.) Fibreboard Exh. 912 (TDP) at §§ H2, H5; Tr. at 2285.

---

[27]Profession Edward Sherman is a distinguished law professor at the University of Texas. His particular fields of expertise are complex litigation, on which he has written books, and class actions, on which he has written numerous articles, including articles discussing asbestos litigation. Tr. at 2281; Owens-Illinois Exh. 1. At the fairness hearing, Professor Sherman presented cogent and credible testimony concerning the merits of the Third-Party Claimant Class Settlement Agreement.

210. The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers. Fibreboard Exh. 912 (TDP) at § H1, Tr. at 1511-13, 1561-64, 2285-87.

211. The Court finds that the Third-Party Claimant Class Settlement redounds to the substantial benefit of Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Tr. at 2295-96. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

212. In addition, the Court finds that the ThirdParty Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Tr. at 2288. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred

in the Manville proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative. Tr. at 2293-95.

213. The Court finds that the Third-Party Claimant Class Settlement also minimizes defense and other transaction costs incurred in the resolution of Global Health Claimant Class members' claims against Fibreboard, thereby increasing the amount of money the Global Health Claimant Class will receive reflecting Fibreboard's share and, derivatively, the size of the set-offs Global Third-Party Claimant Class members will receive. Tr. at 2296.

214. The Court finds that the Third-Party Claimant Class Settlement further allows for the husbanding (through the TDP) of the assets available to pay Fibreboard's liability share, thereby giving Global Third-Party Claimant Class members greater assurance that a source of set-offs will exist for an extended period of time. Tr. at 2289-91, 2295.

215. Finally, the Court finds that the Third-Party Claimant Class Settlement confers upon Global Third-Party Claimant Class members the substantial further benefits of (i) releasing them from any contribution or indemnification claim by Fibreboard or the Insurers; (ii) increasing the likelihood that Fibreboard will be able to meet its unfunded obligations on its settlements of present cases, Tr. at 404-06; and (iii) entitling them to obtain information about personal injury claims received by the Trust in the claims process, thereby reducing the need for them to conduct discovery. Tr. at 229192.

216. The Court finds that the Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. The credible evidence demonstrates that these negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as Georgine and Manville. Tr. at 401-05, 1195.

217. The overwhelming credible testimony demonstrates, and this Court finds, that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

218. The Trilateral Settlement Agreement, which by its terms is subject to the court approval, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. Tr. at 1507-09; Fibreboard Exh. 910 at § 4.1. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (expect for obligations that an Insurer has specifically assumed or preserved

under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). Tr. at 337; Fibreboard Exh. 910 at §§ 1.1, 4.1 The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. Tr. at 377-78. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack. Fibreboard Exh. 910 at § 3.3.

219. The Trilateral Settlement Agreement provides for alternative handling of the consideration paid by the Insurers depending on whether or not the Global Settlement is finally approved. Tr. at 375-79; Fibreboard Exh. 910 at §§ 2.2, 2.3. If the Global Settlement is approved, and the Global Approval Judgment described in the Global Settlement Agreement is entered, the $1.525 billion that the Insurers have paid into an escrow fund (to be supplemented by $10 million from Fibreboard), together with interest and earnings thereon, less certain expenses and amounts paid for interim claims, will be directed to the Trust established pursuant to the Global Settlement Agreement to settle claims of the future asbestos claimants and to pay Trust expenses. If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries -not only claims not filed or settled prior to August 27, 1993, but also asbestos-related

personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims. Fibreboard Exh. 910 at §§ 2.2, 2.3; Tr. at 374-77.

220. The credible evidence establishes, and the Court finds, that the Trilateral Settlement was the result of extremely hard fought, arms's-length negotiations between Fibreboard and Continental. The negotiations leading to the Trilateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court further finds that the Trilateral Settlement is fair and reasonable.

D. The Longshore Settlement

221. On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, et seq., and related statutes. A full discussion of this settlement, and Findings of Fact related thereto, are set forth below at Findings of Fact ¶¶ 398-417.

VII. FUTURE CLAIMS AND VALUE PROJECTIONS AND THEIR IMPLICATIONS FOR THE THREE LITIGATION/SETTLEMENT SCENARIOS BEFORE THE COURT

222. The Court has heard detailed testimony and received reports from three distinguished outside experts -- Dr. William Nicholson (identified above at Findings of Fact ¶ 97), Dr. Thomas Vasquez of KPMG Peat Marwick, and Dr. Mark Peterson of Legal Analysis Systems - concerning the number, mix and timing of the asbestos personal injury claims that Global Health Claimant Class members can be expected to bring against Fibreboard (or the Trust) over the next several decades. In addition, the Court has received extensive evidence from Dr. Peterson going to the appropriate valuation of such claims, as well as to the anticipated costs of defense and administration relating to such claims, both on the assumption that Fibreboard remains in the tort system and on the assumption that the Trust becomes operations. The Court finds that Drs. Nicholson, Vasquez and Peterson each used well established and scientifically reliable methods to estimate future claims activity. The Court has also had the benefit of testimony by experienced and knowledgeable counsel, representing both the Global Health Claimant Class and Fibreboard, as to what the future holds for Fibreboard in terms of claims of the Global Health Claimant Class members and the cost of those claims. Tr. at 836-97, 1786-2279, 25652641; Continental Exhs. 33-37, 37A-37D, 48-51, 51A, 51B, 52, 54; Fibreboard Exhs. 823, 826; Class Plaintiffs Exhs. 1010, 1016.

223. The Court finds that there are a great many uncertainties associated with any effort to project the

number of future asbestos personal injury claims and their costs. Indeed, in the Court's view, the only certainty in this area is that any prediction of an exact overall number of claims, or their exact mix, or their exact dollar value, or the exact amount of costs associated with their handling (in or out of the tort system), will in the end prove incorrect. Tr. at 1993-2000, 2262-63, 2266. Continental Exhs. 34 at 2 & Exh. A.

224. Despite the inherent uncertainties involved, and the impossibility of predicting the future with precision, the Court finds the work of the experts and the views of counsel to be of material assistance in arriving at a reasoned assessment of the risks associated with each of the three basic "scenarios" that are presented by the record: the "Coverage Case scenarios"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

225. The Coverage Case scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval -the parties instead being remitted to continued litigation of Global Health Claimant Class member claims in the tort system, and to prosecution of the Coverage Case to a conclusion in the California courts. The Coverage Case scenarios entails a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. Findings of Fact ¶¶ 34-58. In such an event, it is obvious - in light of (i) the relative insubstantiality of Fibreboard's non-insurance resources, Findings of Fact ¶¶ 59, 96; and (ii) its large exposure to presently existing claims (both settled and unsettled) -that in the event it lost the Coverage Case Fibreboard would at best be able to meet only a small portion

of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated. Tr. at 168-69, 1056-57, 2321-23.

226. There is, of course, also the FibreboardContinental dispute concerning the consequences (if any) of Fibreboard's unilateral assignments to asbestos claimants of rights under the Continental policy. Should Continental finally prevail in its position (vigorously disputed by Fibreboard) that Fibreboard's assignment program entirely vitiated the Continental insurance, Fibreboard would be left with only several hundred million dollars to cover both preand post1959 claims. Any such outcome would render a Fibreboard Coverage Case victory hollow indeed, and would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class -and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted. Tr. at 148-49, 169-70, 1545; Fibreboard Exh. 905.

227. The Trilateral Settlement scenario, while eliminating the Coverage Case risk, nevertheless is problematical for the Global Health Claimant Class. While the Court credits as genuine the optimism expressed in Fibreboard's public statements and in the testimony of Mr. Snyder, its counsel, the Court also notes that Fibreboard's counsel acknowledges a "substantial risk" that the funds provided under the Trilateral Settlement could in the end prove insufficient to assure Fibreboard's survival and provide compensation to all asbestos

claimants against it. Tr. at 437. Given the many uncertainties involved, the Court cannot adopt with confidence either the view of Fibreboard counsel or the pessimistic view of those, including Mr. Kazan and Dr. Peterson, who think it clear that Fibreboard would fall substantially short of meeting all claims under a Trilateral Settlement regime. On the complete record, the Court finds that there is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Global Health Claimant Class without compensation in the event individual actions and adjudications with respect to class member claims were to be permitted. Tr. at 696-98, 914-16, 1201-05, 2053-54, 2059-60, 2667-74; Fibreboard Exh. 919; Continental Exhs. 34 at 65 (Table 39), 37A-37D.

228. Although, again, there are substantial uncertainties involved, and although there is a significant risk -- more than a mere possibility -that there will be a shortfall, the Court finds it more probable than not that under the Global Settlement scenario all Class claims will be paid at fair and appropriate values, although it is not unlikely that some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust. Tr. at 2001-02, 2042-47; Continental Exhs. 35 (Table 38a), 37B37D, 49; Class Plaintiffs Exhs. 1010, 1012, 1019, 1020.

229. In particular, the Court finds no credible evidence that the 1992-93 spike in claims against Fibreboard represents a material permanent increase in the propensity of asbestos victims to sue Fibreboard. Rather, the Court accepts the consensus view of the experts that the phenomenon is a temporary one caused by certain non-recurring events -- such as

the Georgine class action, an increase in case consolidations, the Fibreboard group settlement program and the public awareness (at least among the asbestos plaintiffs' bar) of the very negotiations leading to the Global Settlement itself. Tr. at 2010-11; Fibreboard Exh. 826; Continental Exhs. 37, 37A-37D. Further, the 1992-93 increased filings appear in significant measure either (i) to represent an acceleration of claims that would have been filed later anyway, rather than a real increase in the number of filings; or (ii) to the extent they did represent real new sources of filings, to be of materially lesser severity than Fibreboard's usual historical mix of claims. Tr. at 417-20, 2010-18, 202526, 2036-38; Fibreboard Exhs. 800-819. Finally, the Court notes that even the expert who expects the largest number of claims Dr. Peterson believes that, "under any plausible scenario of a great number that [he has] examined, " the Trust will have enough money to pay all claims. Tr. at 2002; Continental Exh. 49.

230. The Court further finds, upon the expert testimony and the entire record: (i) that the risks to the Global Health Claimant Class from the Coverage Case were such as to make it imperative for the Global Health Claimant Class to seek a reasonable global settlement with Fibreboard and the Insurers; (ii) that, indeed, the Coverage Case risk would have justified the Global Health Claimant Class in accepting such a settlement at a significant discount from whatever dollar amount might have been perceived to be necessary to provide compensation of all class members at appropriate and fair values; (iii) that in fact Plaintiffs' Counsel nevertheless held to their goal of accepting no discount from full value; and (iv) that the Global Settlement ultimately achieved is likely to provide fair and appropriate

compensation for all members of the Global Health Claimant Class.

VIII. COMPARISON OF GLOBAL AND TRILATERAL SETTLEMENTS

231. The Ortiz Intervenors have asserted that the Trilateral Settlement is, from the standpoint of Global Health Claimant Class Members, preferable to the global settlement, and thus the Global Settlement should not be approved by this Court.[28] Ortiz Intervenors Amended Objections, Dkt. No. 428 (Nov. 28, 1994). However, this Court finds, based on the credible evidence presented at the fairness hearing, that if it were up to the Court to choose between the two the Global Settlement is far preferable to the Trilateral Settlement from the standpoint of class members. The Court makes this finding based on a number of factors.

232. The Court finds that the funds available to resolve Global Health Claimant Class member claims under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present

---

[28]Various objectors -- in particular the Ortiz Intervenors and the Flanagan Intervenors -- have advanced a wide array of objections to the Global Settlement. Generally speaking, these objections go to legal matters, rather than to any material factual disputes. All such legal objections are treated separately in this Court's conclusions of law. The Court finds, however, that as to any objections based on issues of fact, the Court has considered those objections and finds them to be without any basis in the record. Accordingly, the Court rejects those objections. There is no credible evidence that the Global Settlement is unfair, unreasonable or inadequate in any respect.

claims and other items under the Trilateral Settlement. Tr. at 378-85, 2667-68; Fibreboard Exh. 919 (Tab 1). However, the Global Settlement will provide substantially more money that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. This Court finds that the amount that would actually reach class members under the Trilateral Settlement would be at least hundreds of millions of dollars less than under the Global Settlement. Tr. 200203, 2054-56; Continental Exhs. 34 at 66-67 & Table 40, 37, 37A. And although there is a significant risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a greater likelihood that the funds will be insufficient to compensate all class members. Tr. 2058-60; Continental Exhs. 37B-37D. The Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more costeffective system that promotes the settlement of claims rather than the defense of them. Tr. at 2056-57; Continental Exh. 48F.

233. According to Mr. Snyder, in order to survive under the Trilateral Settlement, Fibreboard would have to reduce settlement values down to one half of current levels -- an endeavor that would of necessity entail massive costs of defense. Tr. at 433-37, 2661-62, 2672-73. Accordingly, this Court finds that defense costs would be drastically less under the Global Settlement than under the Trilateral Settlement. Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Tr. at 379. In very stark contrast, the Court finds that under the Trilateral Settlement there is a substantial likelihood that Fibreboard would -- in a reasonable

effort to protect is corporate existence -- engage in an intensive litigation defense effort. In the past, Fibreboard has been able to lower asbestos-related claims settlement values on a regional basis, but doing so necessarily entailed a very large increase in defense costs. Likewise, before its entry into the ACF Fibreboard was historically a regional defendant, with its exposure to asbestos-related liability concentrated in the West Coast and Gulf Coast areas. As the Court has found, that exposure expanded nationally under the ACF. Findings of Fact ¶¶ 31-33. Under the Trilateral Settlement scenario, Fibreboard might reasonably determine to incur very substantial defense costs in an effort to return to its more limited pre-ACF geographic exposure, as other defendants -e.g., Owens-Illinois -have done. Tr. at 379-85, 2644, 2668-69, 2674-76.

234. Although Fibreboard's litigation strategy under the Trilateral Settlement cannot be determined with certainty, the credible evidence including testimony from Fibreboard's litigation counsel, Mr. Snyder demonstrates that there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants. Tr. at 379-81, 433-35.

235. The costs of defending asbestos personal injury tort claims against Fibreboard have been both substantial and highly variable, depending on the defense and settlement strategies employed by the company over time. From the time

the ACF ceased operations in September 1988 through 1989, defense costs were $50 million. During the same time, Fibreboard agreed to pay $25 million in settlements, yielding a ration of 2:1 between defense costs and settlement amounts. In contrast, during 1990 annual defense costs were $52 million and Fibreboard settled cases under the SSP amounting to $45 million, a defense to indemnity ration of somewhat more than 1:1, but found itself increasingly drawn into major consolidated trials. Under the assignment settlement program in 1991 and 1992, the ratio of defense costs to settlement amounts was quite low. Defense costs were $26 million in 1991 and $21 million in 1992, while settlement agreements in those years totaled, respectively, $261 million and $943 million. In these years, settlement amounts were substantially higher than would have been paid had Fibreboard been settling with cash, and thereby minimized litigation activity and defense costs. The resulting paper indemnity commitments were relatively high and defense costs were relatively low. Tr. at 230-31; Fibreboard Exh. 919 (Tab 3). The Court finds that Fibreboard's defense costs during the years of the assignment settlement program are not useful to predict Fibreboard's defense costs under the Trilateral Settlement scenario. The Court finds that Fibreboard's pre-1991 experience is probative on this issue.

236. The Court finds that defense costs under the Trilateral Settlement scenario would be very substantial. In the early years of the Trilateral Settlement, it is likely that Fibreboard would spend more on defense costs than on indemnity payments. Tr. at 621-22. While defense costs would vary depending on changes in corporate defense strategy, those costs would markedly reduce the net amount available to

injured class members under the Trilateral Settlement. Tr. at 432-35.

237. Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust in contrast to the 33%-40% fees claimants' attorneys' would often recover under the Trilateral Settlement --thus increasing the compensation that is provided to claimants rather than the their lawyers. Tr. at 379-81.

238. Additionally, the Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. Continental Exh. 40 at ¶¶ 8-13. As or more importantly, the Court finds that operation of the Trust under the Global Settlement will as it is designed and intended to do provide a fair method for compensating claimants against the Trust that is more efficient and less burdensome than those claimants would experience under the tort system. This Court finds, based on the credible evidence, that the Global Settlement will largely mitigate or eliminate the "race to the courthouse" among plaintiffs' lawyers that could well occur under the Trilateral Settlement, and that would likely result in the inequitable distribution of settlement funds to claimants. Tr. at 914-16, 924-25. Accordingly, this Court finds that the Global Settlement will substantially reduce the risk that would otherwise exist under the tort system that later claimants will receive no compensation for their claims, or only a fraction of

the compensation that earlier comparable claimants will receive. Tr. at 2058-60; Continental Exhs. 37B-37D, 40.

239. This Court finds that the Global Settlement will eliminate the unpredictable and sometimes unfair results that have been -- and under the Trilateral Settlement would continue to be -- experienced in the tort system.

240. Finally, the Court is aware of, and takes judicial notice of, the various legislative proposals currently under consideration in the United States Congress that could substantially alter the operation of the tort system itself. See, e.g., H.R. 10 (the "Common Sense Legal Reforms Act of 1995"), 104th Cong., 1st Sess. § 103 (1995). Accordingly, this Court finds that there is real uncertainty as to the future ability of asbestos claimants to recover compensation in the tort system, an uncertainty that the Global Settlement mitigates. Tr. at 911-13, 2770.

241. Although this Court finds that the Global Settlement is far preferable to the Trilateral Settlement from the point of view of all class members, this Court also finds that the Trilateral Settlement is far preferable to no settlement at all -- i.e., to a return to the appeal of the Coverage Case. The credible evidence is overwhelming in support of this finding.

242. Simply stated, the question is whether -- from the standpoint of class members it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the Coverage Case appeal and the possibility, regardless of the

outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and -- given Fibreboard's limited non-insurance assets -- the devastating effect that such outcomes would have on class members, this Court finds that the answer is clear: the Trilateral Settlement is far superior to no settlement at all. Tr. at 913-14.

243. A fortiori, for all the reasons this Court has found, supra, that the Global Settlement is preferable to the Trilateral Settlement, Findings of Fact ¶¶ 231-242, together with the fact that the Global Settlement -- like the Trilateral Settlement -avoids the significant risk of a Fibreboard loss of the Coverage Case, Tr. at 771-93, this Court finds that the Global Settlement is a far preferable to the Coverage Case scenario.

IX. ADDITIONAL FAIRNESS CONSIDERATIONS

A. Operation of the Trust

244. The Court has carefully considered both the terms and operation of the Trust Agreement and the TDP. Dr. Peterson has testified, and the Court finds, that the Trust Agreement and TDP fairly reflect the most modern and sophisticated thinking, making effective use of the information gleaned from prior experience to improve on claims-payment trusts created in other proceedings. Tr. at 2066-77. The Court finds that the Trust Agreement and TDP, taken together as a whole, and with respect to each of their provisions, are fair, reasonable and adequate.

245. The Court finds that the TDP provisions that require that claimants against the Trust first pursue informal avenues for resolving their disputes before bringing them to the tort system provide affirmative benefits both the members of the Global Health Claimant Class and the judicial system itself. These provisions constitute, in effect, alternative dispute resolution mechanisms that are substantially more efficient than the tort system. Tr. at 374-77, 380-83. Accordingly, the Court finds that the fact that those claimants who ultimately exercise their back-end right to pursue claims in the tort system first have to seek informal resolution of their claims is not a significant detriment to the class.

246. Where the need to preserve funds makes it impossible to pay all claims without deferral, the TDP seeks to give priority to those who are most seriously ill -- paying mesothelioma victims first, then asbestos-related lung cancer victims, then other cancer victims, and then those with nonmalignant conditions defined in order of priority as Asbestos Lung Disease-1 ("ALD-1") and Asbestos Lung Disease-2 ("ALD-2"). Fibreboard Exh. 912 (TDP) at 23-25, § F.2.

247. Dr. Richard Kradin, a board certified specialist in pathology, pulmonary medicine and internal medicine, testified without contradiction that the requirements imposed under the Global Settlement for establishing medical diagnoses are reasonable, and that the required test procedures are widely available. Tr. at 531-34, 543-44, 550-51. Dr. Kradin also agreed that the disease process described in the TDP as ALD-1 is, generally speaking, more serious than that described in ALD-2, that the definitions of these disease processes adopted by the agreement are fair and reasonable, Tr. at 545,

and that they encompass all nonmalignant asbestos-related effects that are accepted in the medical and scientific community. Tr. at 546. The definition of mesothelioma is, perhaps, over-inclusive. Tr. at 547. The definition of asbestos-related lung cancer in the agreement is the broadest definition acceptable to the medical and scientific communities -- the most liberal view from the claimant's perspective. Tr. at 548.

248. The Court credits Dr. Kradin's testimony and adopts his conclusion that the disease categories set forth in the TDP fairly reflect the medically recognized categories of asbestos-related diseases, and fairly account for the relative seriousness of the respective conditions.

249. Dr. Bradford Cornell, an expert in finance and computer simulations of financial models, testified about the Trust's operation and capacity to pay claims under various assumptions. Tr. at 1668, 1671-73; Fibreboard Exh. 920. Those assumptions included the average settlement values estimated by Plaintiff's Counsel and the claims projections made by Dr. Nicholson and others. Tr. at 1686-91; Class Plaintiffs Exhs. 1017-1021. These simulations required Dr. Cornell to project the Trust's earning capacity over the next forty years. Since such a projection of future earnings, of course, cannot be quantified with precision, Dr. Cornell presented a series of alternative projections of Trust earnings depending upon what the economic conditions might be over the next forty years, and the likelihood of experiencing different kinds of economic conditions over that period. Class Plaintiffs Exhs. 1019-1021; Fibreboard Exhs. 921, 922A922D.

250. The Settling Parties asked Dr. Cornell to model the claims payment and spendthrift provisions of the Trust and, after doing so, to run the projections made by Plaintiff's Counsel and Dr. Nicholson, Dr. Peterson, the Ortiz Intervenors and Professor Eric D. Green (the Guardian Ad Litem for the Global Health Claimant Class, see Findings of Fact ¶¶ 377-397). His resulting calculations demonstrated that the Trust will be able to pay all claims as they are submitted, assuming:

(1) the more likely economic conditions will prevail over the next 40 years;

(2) case settlement values will approximate the analysis made by the Plaintiffs' Counsel; and

(3) the future number of cases will be at or just beyond the upper end of Dr. Nicholson's projections.

Tr. at 1699-1707; Class Plaintiffs Exhs. 1017-1021.

251. As noted, predictions about the future are fraught with uncertainty. As Dr. Cornell has made clear, there is always a possibility that the economic environment over the next forty years might be significantly less advantageous than it has been over the past forty years, or that adverse economic conditions might prevail during the first few years of the Trust's existence, when it has the most money on hand and the largest number of claims to pay. If so, then the Trust might well find itself unable to pay all the claims filed against it. Tr. at 1707; Class Plaintiffs Exh. 1021. Similarly, if the current projections

of future claims are underestimated, or if settlement values prove higher than now estimated, there could well be insufficient funds in the Trust to pay all claims. Class Plaintiffs Exh. 1020. In those circumstances, the TDP will favor those claimants with the most serious illnesses. Fibreboard Exh. 912 (TDP) at § F.

252. The Court finds that the Trust Agreement and TDP reflect the considered and correct judgment of the Settling Parties that it is necessary and appropriate to preserve Trust assets so that fair compensation is paid not only to claimants who contract asbestos-related diseases in earlier years, but also to those who contract diseases in later years. The Court finds that it is fair and reasonable for the Settling Parties to seek to accomplish this end.

253. The Court finds that the spendthrift provisions of the Trust are reasonably and carefully crafted to seek to achieve the objective of providing fair compensation to all claimants.

254. Three initial trustees have been selected and have agreed to oversee the Trust. Professor Francis McGovern, of the University of Alabama, is known to this Court and to both Plaintiffs' and defendants' attorneys in asbestos litigation as a distinguished law professor in the field of mass torts. His experience includes service as a special master in the Baltimore and Ohio asbestos litigation cases. Tr. at 39394. Charles Renfrew is a former United States District Court Judge in the Northern District of California, a distinguished member of the California bar, and a former Justice Department official and General Counsel of Standard Oil Company. Tr. at 394. The third trustee is Henry Ramsey, Jr.

Judge Ramsey was a Superior Court Judge in Oakland, California, where he presided over and managed the entire Alameda County asbestos docket. For several years he has been Dean of the Howard University Law School. Tr. at 394. The Court finds that Professor McGovern and Judges Renfrew and Ramsey are eminently qualified to serve at trustees of the Trust created pursuant to the Global Settlement.

B. Limitations on Claims Against the Trust

255. As discussed herein, Findings of Fact ¶¶ 200217, the members of the Global Health Claimant Class agreed in the Global Settlement to, among other things: (i) a waiver of their rights (if any) to receive punitive damages from the Trust; (ii) a cap on recoveries against the Trust of $500,000 per claimant; (iii) a waiver of their rights (if any) to recover preand post-judgment interest on awards against the Trust; and (iv) a limit on their ability to recover against the Trust to Fibreboard's several share of liability. These bargained-for concessions by the Global Health Claimant Class serve to preserve the Trust corpus from a few individual and/or early demands that could have the effect of reducing all class members' claims.

256. In light of Fibreboard's history, this Court finds that the waiver of punitive damages is not a significant concession. As previously found, Findings of Fact ¶ 25, with possibly one exception Fibreboard has never paid punitive damages in the tort system. In the few instances where juries have awarded punitive damages against Fibreboard, the cases were ultimately settled for amounts that substantially or entirely discounted the punitive damages component. Tr. at 399400,

1037-38. Moreover, to whatever extent the risk or actual jury award of punitive damages have affected the values of settlements with Fibreboard, that effect is reflected in the historic settlement values that the parties considered in negotiating the Global Settlement, and the trustees of the Trust will have that information available to them in making offers to individual Global Health Claimant Class members. Tr. at 402, 1037-38.

257. This Court finds that the limitation of awards to $500,000 per claimant is also, as a practical matter, a small concession on the part of the Global Health Claimant Class. Tr. at 940-41. In Fibreboard's history there have been approximately twelve individual settlements by Fibreboard in excess of $500,000. Tr. at 401. The $500,000 cap also reasonably reflects the maximum exposure, per claimant, that the Insurers could have faced under their respective policies. Under the circumstances, the Court finds credible and adopts Plaintiffs' Counsel's testimony that the practical impact of the $500,000 limitation is small and the limitation is fair to the class as a whole. Tr. at 940-41.

258. This Court finds that the waiver of pre- and post-judgment interest is fair in light of the structure of the Global Settlement. This Court finds that the Global Settlement is designed to provide significantly faster and more efficient resolution of asbestos claims than the tort system, with significantly less transaction costs and greater certainty of fair compensation being paid within a reasonable period of time. The Court takes judicial notice that prejudgment interest is not available in all states, and postjudgment interest is a remedy available only after a claimant has brought his or her case to trial

-- sometimes on dockets with long delays. The Court finds that, under the circumstances, the Trust provides more value to members of the Global Health Claimant Class than they would receive in the tort system, even considering interest. Tr. at 1160.

259. This Court finds that the agreement by the Global Health Claimant Class to limit claims against the Trust to several liability is a fair exchange for the large and certain corpus of money the Global Settlement makes available to pay Global Health Claimant Class members. To the extent that Fibreboard's potential exposure under the principle of joint and several liability for damage caused by other asbestos manufacturers affected the historic settlement values of claims against Fibreboard, those values are reflected in the overall settlement amount and in the information the trustees can consider in evaluating claims. Tr. at 402.

C. Fibreboard's Contributions to the Settlement and the Insurers' Insistence on "Total Peace"

260. This Court finds that it is entirely fair and reasonable for Fibreboard to have insisted throughout the course of negotiations as an absolute precondition to reaching a global settlement -- that any such settlement be effected without Fibreboard contributing its non-insurance assets (except in the event the Coverage Case appeal went forward and Fibreboard lost that appeal). This Court further finds that Plaintiffs' Counsel acted reasonably in acceding to this precondition. The Court also finds that it was also entirely fair and reasonable for the Insurers to have made as an equally absolute precondition that this settlement provide them with "total peace," and for

Plaintiffs' Counsel to have acceded to that precondition. As previously found, Findings of Fact ¶¶ 125, 129, 255-259, these preconditions were not only essential to reaching an agreement that provides the Global Health Claimant Class with enormous benefits, they work no real detriment to the class.

261. On April 9, 1993, well before the parties had any reason for confidence about the prospects for reaching a global settlement, Continental bound itself to seek to achieve a global settlement that would be paid solely through Fibreboard's insurance resources. The Court finds that, as a direct consequence of the April 9 Agreement, the Global Health Claimant Class received at least an additional $200 million, a sum roughly approximating Fibreboard's corporate worth. That sum was paid on Fibreboard's behalf. Tr. at 1447-50. The Court finds that this contribution was made by the Insurers late in the negotiations, and that it was instrumental in bringing the negotiations to a close.

262. The Court finds, further, that Fibreboard's contribution to the Global Settlement included the skillful conduct of bitterly contested insurance coverage and ancillary litigation, an effort that converted a unique and potentially limited insurance asset into a settlement fund that is many times larger than Fibreboard's entire net worth, and which even provides compensation for otherwise uninsured claims. Fibreboard's efforts to reach a resolution of its asbestos-related liabilities within insurance resources entailed substantial risks to Fibreboard, including the incurring of debt much greater than Fibreboard's net worth, the risk of the assignment litigation, the relinquishing of all of Fibreboard's leverage in the April 9 Agreement in return for Continental's agreement to use its "best

efforts" to accomplish a global settlement within Fibreboard's insurance resources, and acceptance of the Trilateral Settlement as a back-up to the Global Settlement. Finding of Fact ¶¶ 75-82, 91, 128-131, 177. Taking these steps put Fibreboard's corporate existence in jeopardy, and made it reasonable for Fibreboard to insist, in return, that this settlement be funded soley by insurance funds. Tr. at 1163-65.

263. The Court finds that Fibreboard made other valuable contributions to the Global Settlement as well, including, e.g., an undertaking to provide case processing services to the Trust and an assignment of existing contribution claims to the Trust. Findings of Fact ¶ 180.

264. The Court further finds that the factual predicate for putting Fibreboard into an involuntary bankruptcy proceeding pursuant to Section 303 of the Bankruptcy Code of 1986 i.e., that there exist at least three creditors that have claims that are due and unpaid and are in the aggregate unsecured to the extent of at least $5,000 could not be satisfied, either now or at any time during the negotiations that led to this settlement. Fibreboard has at all times carefully structured its settlements, for example, so that payments were not presently due on them, and was paying their other creditors in a timely fashion. Tr. at 1536-37. The Court finds that Fibreboard made a prudent business judgment when it determined not to seek bankruptcy protection as a means of resolving its asbestos-related liabilities. Tr. at 276-78.

265. Based on the credible evidence, including the testimony of an investment banker,[29] the Court finds that a financially prudent buyer would not pay more than approximately $237 million to acquire Fibreboard free of all of its personal injury asbestos liabilities. The costs to Fibreboard of such a transaction would be at least $2 million, leaving a maximum net acquisition value ("Sale Value") of $235 million. Tr. at 247-49, 262, 272. Fibreboard's Sale Value, which far exceeds its current stock market value, fully takes account of the company's future prospects and the above-book values inherent in its timber assets. There is no basis for the Court to find that Fibreboard will ever be worth more in the future, in current dollars, than it is today. Tr. at 269-72, 282-84.

266. Counsel for the Ortiz intervenors asserted that this valuation was too low by $40 million to $50 million. Tr. at 294. Although there was no credible evidence to support this assertion, a difference in value of that order of magnitude would be irrelevant to the issues before the Court because, even if true, the company's asbestos liabilities, including more than $1 billion of liquidated settlement debt as of August 1993, nevertheless dwarfed the company's assets. Tr. at 486-87; Fibreboard Exh. 919 (Chart 3).

---

[29]The Insurers presented the testimony of Richard Clark Abbott, an investment banker. Mr. Abbott is the managing director of Riverway Capital Partners, in Houston, a partnership that focuses on financial advice and investment. For 13 years, Mr. Abbott worked for the international investment banking firm of Morgan Stanley. Mr. Abbott is an expert in corporate finance and mergers and acquisitions, with extensive experience in valuing companies for the purpose of rendering fairness opinions and in advising and managing financially troubled corporations. Tr. at 242-46, 275-76; Continental Exh. 1. He is experienced in advising and raising money for a broad range of corporations, including forest product companies. Tr. at 243.

267. The Court finds that the sources and components of the settlement fund before the Court are factually irrelevant to assessing the fairness of the Global Settlement, but that -- in any event Fibreboard's contribution was both substantial and essential to achieving the result before the Court.

268. The Court also finds that it was entirely reasonable for the Insurers to have insisted that their enormous corporate contributions to this settlement obtain repose for them, and for Plaintiffs' Counsel to have acceded to this requirement. Certainty the ability to calculate their losses and to know that they will pay for this settlement is the principal benefit the Insurers obtain from this settlement. Tr. at 923, 1490-92, 1570, 1604.

D. Changed Circumstances

269. In view of the parties' expectation that the Coverage Case would in any event progress in the California courts without them, thereby changing the circumstances that existed on August 27, 1993, the Global Settlement Agreement specified that the fairness of the Global Settlement is to be viewed as of August 27, 1993, the date on which the agreement in principle was reached. Fibreboard Exh. 912 (Global Settlement Agreement) at § 8.7. The Court is of the view that the appropriate time to view the fairness and adequacy of the Global Settlement is as of August 27, 1993, and the Court has done so herein. Since the conclusion of the Global Settlement agreement in principle of August 27, 1993, significant litigation developments have occurred, however, that had they occurred prior to the conclusion of a settlement could have significantly altered the negotiating landscape. Moreover, these events would

likely have a substantial impact on the behavior of the Settling Parties should the Global Settlement fail to receive final court approval. Accordingly, even if the Court were to assess the fairness of the Global Settlement as of today, these developments provide further compelling evidence that the Global Settlement is fair and should be approved.

270. First, on January 27, 1994, petitions for review of the California Court of Appeal's decision in the Coverage Case were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Fibreboard Exh. 259. Findings of Fact ¶ 47. On July 5, 1995, the California Supreme Court determined that a continuous trigger applies in third-party general liability policies. The court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, _ Cal. Rptr. 2d_, _n. 16 (1995).

271. Second, on October 19, 1994, the California Court of Appeal reversed the decision of the Alameda County Superior Court in the Andrus case, and held that Fibreboard did not have the right to enter into assignment settlement agreements. Tr. at 207; Fibreboard Exh. 336. Fibreboard petitioned the California Supreme Court for review of the Court of Appeal's decision in Andrus, and, on January 4,

1995, the California Supreme Court denied that petition for review. Accordingly, the Court of Appeal's reversal of the trial court decision in Andrus is now final. Tr. at 1515-16; Fibreboard Exh. 337.

272. The Montrose decision notwithstanding, this Court finds that it is doubtful whether Continental would have been willing to agree to a global settlement price of $1.525 billion had the California Supreme Court's grant of review in the Coverage Case and the reversal in Andrus taken place before the conclusion of global settlement negotiations. Tr. at 1518-19. Likewise, the Court finds that, in light of these changed circumstances, were the Global Settlement to fail to receive approval, there is substantial possibility that Continental would no longer be willing to pay $1.525 billion for this settlement. Tr. at 1518-19. Indeed, Continental's counsel indicated at the fairness hearing that were the Global and Trilateral Settlements to fail to obtain the necessary court approvals, Continental's position would be that the assignment settlements constituted a material breach of Fibreboard's insurance policy so as to relieve Continental of any obligations under that policy. Tr. at 1515-16, 1545. Fibreboard disputes both Continental's position in this regard, and -in view of the April 9 Agreement -Continental's right to assert such position.

E. Rule 23 (b)

273. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of inconsistent or varying adjudications with respect to individual members of each such class which would

establish incompatible standards of conduct for the parties opposing those classes.

274. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of adjudications with respect to individual members of each such class which would as a practical matter be dispositive of the interests of the other members of those classes not parties to the adjudications or substantially impair or impede their ability to protect their interests.

275. The Court finds that the parties opposing the Global Health Claimant Class, Global Third-Party Claimant Class and the Longshore Defendant Class have acted or refused to act on grounds generally applicable to each of those classes, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the classes as a whole.

X. THE CLASSES AND CLASS REPRESENTATIVES

A. The Classes

276. The Court adopts and incorporates herein the definitions of the Global Health Claimant Class and the Global Third-Party Claimant Class as set forth in the Court's Order Finally Certifying Plaintiff and Defendant Classes.

277. The Court adopts and incorporates herein the definition of the Longshore Defendant Class as set forth in

the Court's Order Finally Certifying Longshore Defendant Class.

278. The Global Health Claimant Class contains in excess of 100,000 potential claimants. Tr. at 858, 1417. The Global Third-Party Claimant Class contains in excess of two thousand potential claimants. Continental Exh. 45 at 8, ¶ 14.

The Longshore Defendant Class contains at least several thousand members. Affidavit of Peter Van N. Lockwood, sworn to January 31, 1995 ("Lockwood Aff."), Dkt. No. 713, at ¶ 13. This Court finds that, as to each of these classes, the class is so numerous that joinder of all of its members is impracticable. This Court further finds that, as to each of these classes, there are questions of law or fact common to the class.

B. The Class Representatives

1. Global Health Claimant Class Representatives

279. Global Health Claimant Class representative Gerald J. Ahearn, Sr., resides in the state of South Carolina. Mr. Ahearn allege that he was exposed to asbestos-containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at the Charleston Naval Shipyard in Charleston, South Carolina,

during and after the 1940s. Mr. Ahearn has contracted asbestosis, which he alleges is the direct and proximate result of this asbestos exposure. Class Plaintiffs Exhs. 1009, 1024.

280. Global Health Claimant Class representative James R. Dennis resides in the state of South Carolina. Mr. Dennis alleges that he was exposed to asbestos-containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at Delta Air Lines from 1968 to 1970, and during his employment as a pipefitter in various shipyards in Charleston, South Carolina. Mr. Dennis has contracted asbestosis, which he alleges to be a direct and proximate result of that exposure. Class Plaintiffs Exhs. 1008, 1025.

281. Global Health Claimant Class representative Charles W. Jeep resides in the state of Missouri. Mr. Jeep alleges that he was exposed to asbestos-containing products during the course of his employment at the Puget Sound Naval Shipyard from 1944 to 1946. It is his current understanding that those product included products manufactured or supplied by Fibreboard. Mr. Jeep has contracted mesothelioma. Class Plaintiffs Exhs. 1008, 1026.

282. On September 4, 1993, Messrs. Ahearn, Dennis and Jeep each retained the Ness Motley firm to pursue any actions they might have for their asbestos-related diseases. On or about September 7, 1993, Messrs. Ahearn, Dennis and Jeep were contacted by Mr. Cox, who discussed with each of them that an agreement in principle had been reached with Fibreboard, Continental and Pacific, on or about August 27, 1993, to resolve Fibreboard's asbestos liabilities. After

consultation with Mr. Cox, Messrs. Ahearn, Dennis and Jeep each agreed to serve as a class representative in a class action to be filed in this Court. Class Plaintiffs Exhs. 1024-1026; Tr. at 1169-70.

283. On or about December 21, 1993, Mr. Cox and Peter Lockwood (of Caplin & Drysdale) met with Messrs. Ahearn, Dennis and Jeep to explain the proposed Global Settlement Agreement and to seek their authorization to sign the final documents detailing the Global Settlement. After full explanation, Messrs. Ahearn, Dennis and Jeep each authorized Messrs. Cox and Lockwood to sign the agreement on their behalf. Mr. Cox subsequently provided Messrs. Ahearn, Dennis and Jeep, on or about January 12, 1994, with copies of the Global Settlement Agreement, the Trust Agreement, the TDP, and the Glossary. Class Plaintiffs Exhs. 1024-1026; Tr. at 117071.

284. Messrs. Ahearn, Dennis and Jeep each believes that the Global Settlement is a fair settlement that will provide substantial benefits to persons injured by Fibreboard's asbestos-containing products. They each understand that, under the Global Settlement, they and the other class members cannot seek punitive damages or awards of more than $500,000 against the Trust. This does not change their belief that the settlement is fair. Messrs. Ahearn, Dennis and Jeep each understand that an agreement in principle had been reached to settle Fibreboard's liabilities to class members prior to the filing of this action. They have no objection to this procedure, and it does not change their belief that the settlement is fair. They each understand that there is a possibility that, under the settlement, payments to them or to other class members might

be delayed under certain circumstances, and that the settlement provides that persons with more serious diseases, such as cancer, will be paid first if delays become necessary. This does not change their belief that the settlement is fair. Class Plaintiffs Exhs. 1024-1026.

285. Global Health Claimant Class representative William James Mitchell resides in the state of Kentucky. Mr. Mitchell was employed by Henderson Power & Light, in Henderson, Kentucky, between 1951 and 1987. During that time, Mr. Mitchell alleges that he was exposed to asbestoscontaining products (including pipe covering, block, cement and other products) as a boiler operator, lab operator, turbine operator, and as an assistant superintendent. Mr Mitchell believes hat he may have been exposed to asbestoscontaining products manufactured by Fibreboard. Mr. Mitchell is not presently aware of having any asbestos-related disease or condition. Class Plaintiffs Exhs. 1027.

286. On or about December 9, 1994, Mr. Mitchell spoke with P. Jay Cone, II, of the Ness Motley firm. Mr. Cone explained the instant class action to Mr. Mitchell, and Mr. Mitchell agreed to serve as class representative. Class Plaintiffs Exhs. 1027; Tr. at 1173.

287. Global Health Claimant Class representative James Ellison is a former employee of Bethlehem Steel Corporation who worked at the Bethlehem Shipyard in Port Arthur, Texas from 1955 to 1984. Mr. Ellison alleges that he was exposed to asbestos-containing products manufactured or distributed by Fibreboard, and that such exposure was the proximate cause of his lung cancer. He claims that he is entitled

to damages from Fibreboard and to compensation under LHWCA from Bethlehem. Lockwood Aff. at ¶ 7.

288. In sum, the Global Health Claimant Class representatives hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions and exposure to Fibreboard asbestos. They are all members of the Global Health Claimant Class, and fairly reflect the relevant interests of the class. This Court finds that the Global Health Claimant Class representatives have fairly and adequately protected the interests of the Global Health Claimant Class. This Court further finds that the claims or defenses of the Global Health Claimant Class representatives are typical of the claims or defenses of the Global Health Claimant Class.

2. Global Third-Party Claimant Class Representatives

289. Owens-Illinois is well known to this Court, and to all judges experienced in asbestos litigation, as one of the most frequently sued asbestos defendants. OwensIllinois received between 17,000 and 20,000 asbestos personal injury claims per year between 1991 and 1993. Tr. at 2677. The company is, like Fibreboard, known in the asbestos litigation as a "pipe and boiler" defendant. Tr. at 168. It has been a member of the MDL Defense Steering Committee

formed by Judge Weiner. Tr. at 403. Owens-Illinois has litigated many asbestos injury cases through trial and on appeal. Srite v. Owens-Illinois, Inc., 870 S.W.2d 556 (Tex. Ct. App. 1993), rev'd in part sub nom. Owens-Illinois, Inc. v. Estate of Burt, 897 S.W.2d 765 (Tex. 1995); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992). It has considerable experience in dealing with settlement set-off and credit issues. Tr. at 1195.

290. Owens-Illinois took a strong position and objected vigorously to the Georgine settlement which, unlike the Third-Party Claimant Class Settlement here, did not protect third-party credit and set-off concerns. Tr. at 1195. It took a similar position in protection of third-party interests in the Manville litigation. Tr. at 1513; In re Joint Eastern and Southern Districts Asbestos Litigation ("Manville"), 982 F.2d 721 (2d Cir. 1992), mod'd, 993 F.2d 7 (2d Cir. 1993). Fibreboard and Plaintiffs' Counsel met with Owens-Illinois representatives, and with others on the MDL Defense Steering Committee, to discuss and explain the operation of the Trust created by the Global Settlement. Tr. at 403, 1511-12.

Owens-Illinois and other Steering Committee members expressed well-understood concerns (i) that all money paid by the Trust be available to Fibreboard's co-defendants where appropriate as credits and set-offs in the tort system; and (ii) that the set-off and credit calculation mechanism be fair. This was the first time in the history of the asbestos litigation that co-defendants had been invited to the bargaining table in a comparable situation. Tr. at 403.

291. This Court finds the Owens-Illinois has fairly and adequately protected the interests of the Global Third-Party Claimant Class. This Court further finds that Owens-Illinois' claims or defenses are typical of the claims or defenses of the Global Third-Party Claimant Class.

3. Longshore Defendant Class Representative

292. Bethlehem Steel Corporation is one of the largest industrial corporations in the United States, which, through its ownership and operation of shipyards, is regularly subject to claims by its employees for compensation under LHWCA. Those claims -- thousands of which have been filed against Bethlehem -- include over 1,000 claims arising from asbestos-related diseases or deaths caused by exposure to asbestos-containing products (including products manufactured or distributed by Fibreboard) utilized by Bethlehem employees such as Global Health Claimant Class representative Ellison while working for Bethlehem. Bethlehem is a self-insured employer, and, as such, is for LHWCA purposes both an employer and an insurance carrier. Lockwood Aff. at ¶ 16; Affidavit of Donald S. Bauman, sworn to January 30, 1995

("Bauman Aff."), Dkt. No. 712, at ¶¶ 4, 5; 33 U.S.C. §§ 902(5), 932(a)(2). This Court finds that Bethlehem has fairly and adequately protected the interests of the Longshore Defendant Class. This Court further finds that Bethlehem's claims or defenses are typical of the claims or defenses of the Longshore Defendant Class.

XI. ADEQUACY OF CLASS COUNSEL

A. Global Health Claimant Class Counsel

293. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. law firms representing asbestos claimants. The Ness Motley firm has been involved in approximately 50% of all asbestos claims in the United States. Tr. at 1455. Mr. Kazan is a partner with the law firm Kazan, McClain, Edises & Simon. He has been involved in asbestos-related cases since the mid-1970s. The majority of his practice involves the representation of asbestos victims. Tr. at 899-901. Mr. Wartnick is a member of the law firm Wartnick, Chaber, Harowitz, Smith & Tigerman. Since 1981 his practice has been devoted primarily to representing asbestos claimants. Tr. at 642.

294. In considering with whom to negotiate a global settlement, Fibreboard and later, the Insurers and this Court took into account the prominence the Ness Motley firm and Messrs. Kazan and Wartnick had in the area of asbestos litigation. Tr. at 212-14, 1454-55. The Ness Motley firm was seen as necessary to any successful global settlement, in that the firm had been involved in most major litigations with Fibreboard since 1990, served as class counsel in Linscomb, was serving as

co-lead counsel in the MDL proceedings, and Messrs. Motley and Rice had been serving as class counsel in Georgine. Accordingly, the Ness Motley firm had substantial credibility among the members of the plaintiffs' bar. Tr. at 212, 145455; Georgine, supra, 157 F.R.D. 246. Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located and where it faced major liabilities. They were among the most knowledgeable counsel with respect to Fibreboard and were viewed as such by their colleagues. Tr. at 214, 1454.

295. Although during late Spring of 1993, when global settlement negotiations had stalled, Continental considered seeking to negotiate with other counsel for asbestos claimants, Continental concluded that Messrs. Rice, Cox, Kazan and Wartnick were the appropriate and necessary negotiating counsel. This conclusion was based on Ness Motley's degree of participation nationally in asbestos claims and the respect for that firm, the prominence of Messrs. Kazan and Wartnick on the West Coast and the degree of respect for their firms, and the fact that an attempt to recommence negotiations with other counsel would be viewed as an attempt to avoid the lawyers who were representing asbestos claimants' interests most aggressively. Tr. at 1456-57.

296. This Court has had extensive experience with, and knowledge of, Messrs. Rice, Cox and Kazan, and had been advised of Mr. Wartnick's historical involvement in prosecuting asbestos personal injury cases against Fibreboard, prior to August 9, 1993. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick are prominent attorneys, highly respected for their knowledge, experience, skill and special

competence in the field of asbestos litigation.[30] This Court further finds that Fibreboard chose to negotiate with these counsel -and this selection was ratified by the Insurers and this Court -based on their reputations, experience and extensive involvement in asbestos litigation. These characteristics of Plaintiffs' Counsel were what led this Court to formally appoint them as negotiating counsel for the Global Health Claimant Class. This Court finds that Plaintiffs' Counsel have provided adequate, professional and ethical representation to the Global Health Claimant Class.

297. Plaintiffs' Counsel have been well served by their retention of Caplin & Drysdale, who have advised them in areas outside their own expertise and worked side by side with them throughout the negotiations with Fibreboard and the Insurers. Tr. at 647, 1550. Caplin & Drysdale is widely recognized as a highly effective law firm, with expertise in a broad range of complex areas. Tr. at 1556, 2127-28, 2345. In addition, Caplin & Drysdale, and particularly the principal lawyers involved in this case Messrs. Inselbuch and Lockwood have extensive experience in the field of asbestos litigation, although they have not represented individual health claimants. Tr. at 1556, 1772. Mr. Inselbuch represented the Asbestos Health Claimants Committee in the Manville bankruptcy from

---

[30]Mr. Leonard Jaques, Esq., has asserted an objection to this settlement on the ground that "[c]ounsel for the named plaintiffs are not qualified to represent these Maritime Claimants in the specialized field of martitime law." Objections to Proposed Global Settlement by the Maritime Intervenors, Dkt. No 395 (Oct. 31, 1994), at 5. Mr. Jaques presented no evidence in support of this objection, and the Court finds that there is no such evidence in the record. Indeed, the evidence is to the contrary. Tr. at 1004-05. Accordingly, this objection is rejected.

October 1985 through confirmation and consummation of the Manville Plan of Reorganization in 1988, and has represented the class of beneficiaries of the Manville trust in the restructuring litigation. See Kane v. JohnsManville Corp., 843 F.2d 636 (2d Cir. 1988) and Manville, supra, 982 F.2d 721 (2d Cir. 1992). The Court finds that Caplin & Drysdale is a highly experienced and qualified firm, whose participation in these negotiations materially benefitted the Global Health Claimant Class.

B. Global Third-Party Claimant Class Counsel

298. Owens-Illinois' counsel in this action, R. Bruce Shaw, of the law firm of Nelson, Mullins, Riley & Scarborough, and Richard L. Josephson, of the law firm of Baker & Botts, L.L.P., are among the best and most qualified attorneys representing defendants in asbestos-related litigation. Tr. at 1196. This Court finds that these counsel have provided adequate representation to the Global Third-Party Claimant Class.

C. Longshore Defendant Class Counsel

299. Bethlehem is represented before this Court by its Labor Counsel, Donald S. Bauman. Mr. Bauman has responsibility at Bethlehem for, inter alia, LHWCA and workers' compensation matters, and is thus experienced in this area of the law. Bauman Aff. at ¶ 1. This Court finds that Mr. Bauman has provided adequate representation to the Longshore Defendant Class.

XII. ETHICAL CONSIDERATIONS

300. The Ortiz Intervenors raise two categories of objections with respect to Plaintiffs' Counsel that they assert implicate questions of legal ethics and professional responsibility.[31] First, the Ortiz Intervenors argue that Plaintiffs' Counsel had an impermissible conflict of interest arising out of their simultaneous representation of present and future asbestos claimants. Second, the Ortiz Intervenors argue that there were conflicts of interest within the Global Health Claimant Class -which this Court will label "intraclass" conflicts -which they initially argued required separate subclasses. Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994). At the fairness hearing, however, the Ortiz Intervenors -through the testimony of their ethics expert -appeared to retreat from their position that subclasses were needed, and asserted that the varying interests of the future class members required instead that there should have been lawyers representing all of the individual interests during the negotiation

---

[31]The Flanagan Intervenors have raised some of the same objections. Objections to Proposed Global Settlement By the Maritime Objectors, Dkt. No. 395 (Oct. 31, 1994). The Court's findings of fact and conclusions of law apply equally with respect to their objections. Mr. Jaques, counsel to the Flanagan Intervenors, has also asserted an additional argument regarding the ethical conduct of Plaintiffs' Counsel. Mr. Jaques asserts that the Settling Parties violated "ethical canons" by allegedly "arranging for the appointment of Class Counsel to 'represent' thousands of merchant mariners already known to have retained counsel . . . ." Id. at 4. The Court rejects this argument. This Court - and not the Settling Parties -was responsible for the appointment of Plaintiffs' Counsel to represent the Global Health Claimant Class. Moreover, Judge Weiner has specifically rejected Mr. Jaques's argument that he in fact has been appointed to represent all Maritime Claimants in the MDL 875 action. Order, Georgine, supra (Feb. 24, 1994).

of the settlement. Tr. at 1886-88. The Ortiz Intervenors assert that the presence of these alleged conflicts requires the Court to reject the Ahearn settlement for lack of adequate representation of the Global Health Claimant Class.

301. The Ortiz Intervenors offered Professor John Leubsdorf as an expert witness on these issues. Professor Leubsdorf is a law professor at Rutgers University Law School, and has taught courses in civil procedure and legal professional responsibility. He is a co-author with Professor Geoffrey Hazard of a textbook on civil procedure, and is one of two associate reporters for the American Law Institute's Restatement of the Law Governing Lawyers. Tr. at 1749-50; Ortiz Exh. 12. Although this Court finds that Professor Leubsdorf qualifies as an expert on issues of legal ethics and professional responsibility, it notes that he has had no asbestos litigation experience and has never testified or been consulted or retained as an expert or as counsel in any matter involving mass torts or asbestos litigation.[32] Tr. at 179192; Ortiz Exh. 12.

302. In response, the Settling Parties assert (i) that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel created by the concurrent representation of present and future claimants; (ii) that Plaintiffs' Counsel reasonably believed that the representation of the Global Health Claimant Class would not be adversely affected; and (iii) that the Court, in approving this

---

[32]Professor Leubsdorf was the primary author of an amicus brief submitted by 25 law professors in Georgine. However, the Georgine court did not accept the amicus brief, on the ground that its proponents "have only limited knowledge of the underlying facts and issues before the Court." Order, Georgine, supra (April 11, 1994); Tr. at 1791-92.

settlement on a full record and after close scrutiny, supplied any consent that might have been required on behalf of the absent class members. The Settling Parties further assert that there were no antagonistic interests within the Global Health Claimant Class that would require either subclasses or the separate representatives recommended by Professor Leubsdorf at the fairness hearing. Tr. at 231642.

303. In support of their views, the Settling Parties introduced the expert testimony of Professor Geoffrey Hazard, a nationally recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard is a law professor at the University of Pennsylvania Law School, and is the Director of the American Law Institute. For many years, Professor Hazard taught primarily at Yale Law School in the fields of professional responsibility, legal ethics and civil procedure. Pacific Exh. 3. He is the primary author of The Legal Profession: Responsibility and Regulation and The Law and Ethics of Lawyering, and has authored over one hundred articles, many of which address issues of legal ethics and professional responsibility. Pacific Exh. 3.

304. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation, and is currently an emeritus member of the Rand Institute. He was the Reporter to the Kutak Commission, the body responsible for the preparation of the ABA Model Rules of Professional Conduct. Pacific Exh. 3; Tr. at 2307-12. Moreover, Professor Hazard has extensive experience as a consultant in the fields of professional responsibility and legal ethics, and has previously testified with respect to similar ethics issues in Georgine, where he was

recognized as a competent expert whose opinions were accepted by Judge Reed in his decision in that case. Georgine, supra, 157 F.R.D. at 297. In light of Professor Hazard's extensive experience, training, education and knowledge of issues in this field of expertise, this Court finds he is a competent expert with respect to the issues on which he proffered his opinion in the case.

305. This Court arrived at its findings of fact regarding the ethics issues presented in this action based on a full review of the extensive record developed at the fairness hearing, including both the testimonial and documentary evidence presented. The Court has also heard the views of the Guardian Ad Litem for the Global Health Claimant Class, and read his report on these subjects. After careful consideration of the entire record, and particularly the testimony of both ethics experts and that of the negotiators themselves, this Court credits Professor Hazard's testimony as wholly persuasive and consistent with existing federal legal principles and the underlying facts of this case. This Court rejects the opinions and conclusions of Professor Leubsdorf for the following reasons: (i) his testimony reflects a lack of consideration of relevant testimonial and documentary evidence; (ii) in a number of areas the factual basis for his testimony is not supported by the record; (iii) his conclusions and recommendations are speculative and in many cases impractical; (iv) in some areas his testimony lacks credibility or is contrary to settled federal law and ethical precepts; and (v) he lacks sufficient experience in mass torts and asbestos litigation.

A. Alleged Conflict of Interest

Between Present and Future Claimants

306. The history of discussions and negotiations between various parties in this case is extremely complex, spanning a period of almost three years. Accordingly, the Court adopts the logical approach used by Professor Hazard of analyzing whether the conduct of Messrs. Rice, Cox, Kazan and Wartnick comported with the relevant ethical standards by examining that conduct in the context of five discrete time periods: (i) early 1991 until April 9, 1993; (ii) April 9, 1993 until August 9, 1993; (iii) August 9, 1993 until August 27, 1993; (iv) August 27, 1993 until October 12, 1993; and (v) October 12, 1993 until December 23, 1993.

307. Professor Hazard testified, and this Court finds, that at no time during any of these five relevant periods of settlement discussions and negotiations did Plaintiffs' Counsel have a conflict of interest between their present clients and the class of future claimants that materially limited their responsibilities to the future claimant class. Tr. at 2340. The Court notes that Professor Hazard, in rendering his opinion, relied on the rules of professional conduct as adopted in various jurisdictions (specifically, Model rules of Professional conduct 1.7(b) and 1.8), as well as the decisional law. Tr. at 2313-14. Professor Leubsdorf agreed that these were the appropriate authorities upon which to rely. Tr. at 1764, 1805.

308. In addition, the record clearly reflects that the global settlement negotiations actually contemplated a settlement of both present and future claims not only up to and following the April 9 Agreement, but until the parties' meeting with Judge Higginbotham on July 13, 1993 (at which time Judge

Higginbotham stated his view that the parties should focus on achieving a global settlement with respect to future claims only). Tr. at 1399-1400. Indeed, the April 9 Agreement by its terms contemplated a global settlement of both present and future claims. Fibreboard Exh. 908 at ¶ 2. And, even after the meeting with Judge Higginbotham, the scope of the negotiations remained in flux, with the parties in fact considering a settlement of both present and future claims (as occurred at the meetings in Dallas the week of August 9). It was not until August 22, 1993 in Philadelphia -only five days before the August 27 agreement in principle -that Plaintiffs' Counsel for quite legitimate reasons rejected a combined global settlement of present and future claims, and absolutely stated that they would only do a global deal with respect to future claims. Tr. at 325, 1426-27. Findings of Fact ¶ 170. At that late date, this Court finds that it would have been unreasonable and contrary to the interests of the Global Health Claimant Class for Plaintiffs' Counsel to leave the field.

309. This Court finds that the record is devoid of any credible evidence that, at any time during the relevant periods of discussions and negotiations, Fibreboard or the Insurers conditioned the settlement of Plaintiffs' Counsel's present cases on an agreement from Plaintiffs' Counsel to enter into a global settlement. This Court further finds that -- as Professor Leubsdorf himself acknowledged, Tr. at 1816-17 -- the instant record is devoid of any evidence that the Global Settlement was the result of any collusive or fraudulent conduct. The Global Settlement was not the result of collusive or fraudulent conduct on the part of the parties thereto.

1. Time Period (i): Early 1991 Through April 9, 1993

310. A full description of the relevant events that transpired during the period of time beginning in early 1991 through April 9, 1993 is set forth in Findings of Fact ¶¶ 91-132.

311. Professor Hazard testified, and this Court finds based on the credible evidence, that during these early discussions none of Plaintiffs' Counsel engaged in any conduct with respect to what subsequently became know as the Global Health Claimant Class that violated any rule of ethics. Tr. at 2315-16.

312. As Professor Hazard noted, during this period of discussions concerning the possibility of an assignmentbased global settlement of present and future claims "there was . . . no identified class" -i.e., no actual client - and thus no attorney-client relationship between Plaintiffs' Counsel and what subsequently became the Global Health Claimant Class. Tr. at 2316-17. Specifically, Professor Hazard testified, and this Court finds, that there was no conflict of interest during this time period with respect to Plaintiffs' Counsel's representation of their present clients and their conduct with respect to the subsequent class of future claimants, given the lack of an attorney-client relationship between Plaintiffs' Counsel and the as yet unidentified future claimant class. Tr. at 2317. Moreover, this Court agrees with Professor Hazard in finding that the record contains no credible evidence that during this period any of Plaintiffs' Counsel "did anything that was in any way adverse or constrained as far as the interests" of the

subsequent future class members were concerned, or were in any way impaired with respect to their representation of the incipient future class by their "continuing responsibilities to . . . what are now called the presents." Tr. at 2317.

2. Time Period (ii):
April 9, 1993 Through August 9, 1993

313. A full description of the relevant events that transpired during the period of time from April 9, 1993 through August 9, 1993 is set forth in Findings of Fact ¶¶ 133-153.

314. The credible evidence in the record demonstrates that -with respect to the period of time from April 9, 1993, when Continental and Fibreboard executed the April 9 Agreement, until August 9, 19[illegible] the date on which this Court appointed Plaintiffs' Counsel as negotiating counsel --Plaintiffs' Counsel's conduct toward the potential future claimants was, as phrased by Professor Hazard, "in conformity with ethical requirements." Tr. at 2318. In reaching this finding, this Court accepts Professor Hazard's conclusion that, although Plaintiffs' Counsel had not yet established an attorney-client relationship with the future claimants during this time period, they had nevertheless assumed a fiduciary responsibility toward them because Judge Higginbotham, acting as Settlement Facilitator, had, on July 13, 1993, focused the settlement discussions in such a way that a sharper definition of a possible class of future claimants had begun to emerge. Tr. at 2319-20; Findings of Fact ¶ 147.

315. This Court further finds that even assuming Plaintiffs' Counsel had an attorney-client relationship with the incipient future class during this time, their conduct still conformed to the standards of professional ethics. As Professor Hazard noted, it would have been entirely proper for a plaintiffs' lawyer to represent more than one client against a defendant without such representation creating a conflict of interest. Tr. at 2320-21. The credible evidence further reflects, and this Court thus finds, that during this period of time there was no competition between present and future claimants for insurance funds. Tr. at 1557-58. Specifically, the record does not support the assumption underlying Professor Leubsdorf's opinion that a conflict existed -- that claimants were competitors in a zero sum game -- and that as a result Plaintiffs' Counsel were forced to favor the interests of one group over the other. No party to these negotiations testified, and no document supports the assertion that Plaintiffs' Counsel viewed the present and future claimants as other than multiple clients for whom Plaintiffs' Counsel exercised zealous representation. Indeed, the evidence is to the contrary. Tr. at 1557-58.

316. The Court agrees with Professor Hazard that the possibility of a no-coverage decision in the Coverage Case appeal presented a significant risk to the present and future claimants alike. Tr. at 792-93, 1056-57, 2321-23. The Court also finds that present and future claimants were facing a further risk of impairment due to the litigation between Continental and Fibreboard with respect to the validity of certain assignments of insurance policy benefits. Tr. at 1162-65, 1514-17, 2323-24. These uncertainties -- which gave present and future claimants alike a substantial interest in a global resolution

of the Coverage Case -- were properly taken into account by Plaintiffs' Counsel. Tr. at 2321-24.

317. This Court's decision on August 9, 1993 to follow the recommendation of Judge Higginbotham[33] and appoint Messrs. Rice, Cox, Kazan and Wartnick to negotiate the prospect of a Rule 23(b)(1)(B) settlement class composed of future claimants was based on the reputation, skill, knowledge, past and present representation of asbestos claimants, and extensive experience of these four attorneys in asbestos litigation. Findings of Fact ¶¶ 293-296. Furthermore, the context in which this Court appointed Plaintiffs' Counsel was framed by the Court's knowledge and understanding of the impending risk of the Coverage Case appeal, Findings of Fact ¶¶ 36-47; the existence and terms of the Substitute Ness Motley Agreement, Findings of Fact ¶¶ 151-153; and the history of the relationships among the parties, Findings of Fact ¶¶ 89-158. In light of the requirements of Rule 23 as well as the added significance of these aforementioned factors, it was crucial for this Court to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal.

318. This Court fully credits Professor Hazard's testimony that it was essential for this Court on August 9, 1993 to appoint attorneys who had experience, knowledge and "established competence and standing" in

---

[33]Letter of Judge Higginbotham dated August 5, 1993 (Fibreboard Exh. 586)

asbestos litigation to negotiate on behalf of the potential class of future claimants. Tr. at 2330. As Professor Hazard observed, asbestos litigation is and "extremely complex subject that takes intensive engagement to . . . understand and appreciate." Id. This Court finds that if this Court had appointed attorneys who did not have extensive background in asbestos litigation, it would have been an "invitation for bitter sort of criticism" and would have "jeopardiz[ed] any effort at serious negotiations." Tr. at 2330-31; Class Plaintiffs Exh. 1014 at 89-90; Class Plaintiffs Exh. 1023 at 14-15. In addition, this Court finds that the appointment of counsel inexperienced in asbestos litigation would have resulted in a less favorable settlement for the Global Health Claimant Class than the settlement that was in fact reached. Tr. 411-13, 1474-77.

319. Having fully considered all the evidence, this Court rejects Professor Leubsdorf's view that the following "practical alternatives" existed for the elimination or avoidance of what he viewed as conflicts of interest: (i) in 1991, Plaintiffs' Counsel (or some other set of plaintiffs' attorneys) could have settled their present cases with Fibreboard for cash, and agreed not to represent any additional present claimants until a global settlement agreement was executed, Tr. at 1918-19; or (ii) in August 1993, this Court could have appointed attorneys without asbestos experience because it is "quite possible that lawyers who had never actually litigated an asbestos case in the courtroom would nevertheless have a great deal of knowledge that would be relevant and very helpful in . . . settling this case." Tr. at 1770-72.

320. The Court rejects this testimony, as the evidentiary record does not support a conclusion that these were

practical or even realistic alternatives. First, since at least 1991 Fibreboard had not settled any of its asbestos-related personal injury cases on an all-cash basis, but had instead entered into a number of assignment settlements that contained "back-end" provisions. Findings of Fact ¶¶ 75-88; Tr. at 191-92. Selecting certain counsel to negotiate a global settlement by paying those counsel entirely in cash to settle their present cases would, at the very least, create an appearance of impropriety and a wellspring of opposition from other claimants' counsel whose clients had not been as favorably treated. In addition, had Fibreboard insisted that Plaintiffs' Counsel settle their present cases and agree not to represent additional present claimants, such an agreement would have constituted a violation of ethical rules. See Model Rule of Professional Conduct 5.6(b).

321. Moreover, given the fact that most, if not all, of the assignment settlements made by Fibreboard since 1991 had a "most favored nations" clause in them, see, e.g., Continental Exh. 14, an all-cash settlement by Fibreboard with any individual claimant would likely have triggered that clause in the assignment settlement agreements, thereby requiring Fibreboard immediately to pay those settlements in cash. The dollar amount of those settlements far exceeded Fibreboard's net worth, and it would have been impossible for Fibreboard to have made such payments. Tr. at 168-69, 231; Continental Exh. 14; Fibreboard Exhs. 700-709. Accordingly, Fibreboard could not as a practical matter negotiate a global settlement with supposedly "conflict-free" lawyers who had settled their present cases on an all-cash basis.

322. Second, Professor Leubsdorf himself acknowledged, and this Court finds, that the appointment of any

attorneys other than Plaintiffs' Counsel on August 9, 1993 would have created delay in the settlement process, as less experienced lawyers would have been unlikely to have negotiated a global settlement within the eighteen days between August 9 and August 27, 1993. Tr. at 1853. Moreover, as this Court has already found, it was not definitively decided that the global settlement being negotiated would consist solely of future claims until August 22, 1993. Findings of Fact ¶ 170.

323. Based on a review of the entire record, this Court finds that the appointment of less competent or less experienced attorneys would have subjected the Global Health Claimant Class to a substantial and potentially devastating risk that no settlement could be reached before an appellate decision was rendered in the Coverage Case, which could have occurred as early as August 27, 1993. The Court finds further that had negotiation by other, less experienced, attorneys resulted in a global settlement by August 27, in light of the circumstances of the case and the particular positions of the parties, such settlement would have been substantially less advantageous for the future claimant class. Tr. at 411-13, 1474-77, 2787.

324. Accordingly, this Court finds that there were no practical alternatives available with respect to the appointment of class counsel under the specific circumstances of this case. This Court further finds that this Court's appointment of Plaintiffs' Counsel as negotiating counsel on August 9, 1993, did not materially change or augment the fiduciary duties already owed to the future claimants by plaintiffs' counsel. Tr. at 2333.

3. Time Period (iii) August 9, 1993 Through August 27, 1993

325. A full description of the relevant events that transpired during the period of time from August 9, 1993 through August 27, 1993 is set forth in Findings of Fact ¶¶ 154-181.

326. This Court agrees with Professor Hazard's conclusion, and finds, that during the period of time from August 9, 1993 through August 27, 1993, Plaintiffs' Counsel did a highly effective job of negotiating on behalf of the incipient futures claimant class under the attendant circumstances. Tr. at 2336. The record is replete with evidence supporting this finding. Tr. at 1464-81; Findings of Fact ¶¶ 159-181. To the very end of the negotiating process, Plaintiffs' Counsel sought -and eventually obtained -substantial additional benefits for the Global Health Claimant Class, including an additional $35 million in compensation in the final hours of the negotiations. Findings of Fact ¶¶ 174.

327. Although Professor Leubsdorf stated his view that the trigger provisions for the contingent back-end payments in the Substitute Ness Motley Agreement gave rise to conflict of interest between the ness Motley settled claimants and the future claimants, Tr. at 1760-62, this Court instead credits Professor Hazard's convincing testimony that the Substitute Ness Motley Agreement -- including the back-end contingent payment feature of that agreement -- did not create an impermissible conflict of interest. Tr. at 2324-29. This Court finds that the interests of the future claimant class

members were synergistic and compatible with those of the present claimants whose claims were settled under the Substitute Ness Motley Agreement, given that any class settlement --which would act as a trigger for the Ness Motley back-end payments -would require court approval. Such an approval process requires a court to evaluate the fairness and reasonableness of the settlement, as well as the adequacy of the representation. Had Plaintiffs' Counsel attempted somehow to benefit their present clients by failing to negotiate zealously and diligently on behalf of the future class -thus failing to provide the class with adequate representation -they would have precluded judicial approval of the Global Settlement, thereby jeopardizing the possibility that the back-end payments would be triggered. Tr. at 2326-29. Moreover, at the time the Substitute Ness Motley Agreement was reached on August 5, 1993, the potential of a combined global settlement of both present and future claims continued to exist. Findings of Fact ¶¶ 151-170.

328. This Court finds that it was in the common interest of both the present Ness Motley claimants and the future class members that Plaintiffs' Counsel diligently and loyally negotiate the best possible global settlement on behalf of the future class, as it was in the interest of both groups to achieve a global settlement for the future class that would receive court approval. This Court finds further that it was in the common interest of both groups that a global settlement be reached prior August 27, 1993, due to the risk presented by the Coverage Case appeal. Findings of Fact ¶¶ 36-57. This common interest required Plaintiffs' Counsel to balance their efforts at negotiating for the last possible dollar that could be obtained for the future class, against the possibility that a global

settlement would not be reached and the Coverage Case appeal eventually decided in favor of the Insurers.

329. This Court finds that Plaintiffs' Counsel effectively used the threat posed to Continental by the Fibreboard v. Continental litigation in this Court, which sought to implement the Initial Ness Motley Agreement (and which itself provided for settlement values substantially higher than had historically been the case), to conclude the Substitute Ness Motley Agreement at settlement values that were higher than historical values. Plaintiffs' Counsel then used the higher-than-average Substitute Ness Motley Agreement values to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients. Tr. at 1538-40. Accordingly, this Court finds that settlement of the Ness Motley cases, occurring when and as it did, ultimately benefited the members of the Global Health Claimant Class.

330. This Court rejects any implication as factually unfounded that the Substitute Ness Motley Agreement was somehow part of a "tying arrangement" by which Messrs. Rice and Cox were "paid off" with an excessively rich settlement of their firm's cases at the expense of the future claimants. The credible evidence makes clear, and this Court finds, that (i) the Settling Parties jointly determined to settle the Ness Motley cases before focusing on a global settlement; (ii) Continental itself had independently reached the conclusion that a Ness Motley settlement was a necessary precondition to a global deal because of the litigation facing it seeking a Final 5.2 Order and the need to bring Pacific to the bargaining table,

Findings of Fact ¶¶ 149-150; and (iii) Judge Higginbotham indicated that in his view a global settlement should consist solely of future claimants. Findings of Fact ¶ 147.

331. This Court also finds, based on the extensive record established at the fairness hearing, that in reaching the Global Settlement agreement in principle announced in this Court on August 27, 1993, Plaintiffs' Counsel obtained the best possible settlement for the future class available at that time. The Court further finds that Plaintiffs' Counsel reasonably believed that the average claims values upon which they priced the Global Settlement were roughly equivalent to the average claims values inherent in the Substitute Ness Motley Agreement once the latter are discounted both for delay and risk of nonpayment. Tr. at 1155-58.

332. Mr. Robert Sweeney testified that he (i) did not take part in the global settlement negotiations in August; and (ii) moved this Court in September to be relieved of his position as negotiating counsel, due to his personal belief that he had a conflict of interest arising out of his representation of present clients and his duty toward the future claimant class. Tr. at 2434, 2437, 2452-53, 2464-66. However, on December 27, 1993, Mr. Sweeney wrote to this Court asking to be appointed as counsel to the Global Health Claimant Class. Tr. at 2446, 2466-70; Continental Exh. 55. Mr. Sweeney made this request despite the fact that he had not yet signed a settlement agreement with Fibreboard for his present cases. Tr. at 2437-38. This Court declined Mr. Sweeney's request, because the Global Settlement Agreement had already been negotiated to completion and executed on December 23, 1993. Mr. Sweeney has not objected to this settlement. Tr. 2442-43.

333. Mr. Sweeney is not an expert in the field of legal ethics and professional responsibility, nor did he assert at the fairness hearing that Plaintiffs' Counsel had violated any ethical precepts. To the contrary, he expressly declined to offer such a view. Tr. at 2431, 2479-80. Moreover, this Court does not find Mr. Sweeney's testimony to be persuasive even with respect to the issue of whether he believed that he faced a conflict of interest in negotiating a future claimant global settlement. For one thing, although Mr. Sweeney testified that he felt he could not act as negotiating counsel because he had not settled his present cases, he attended the negotiating sessions in both Philadelphia and Tyler during the week of August 23, 1993, apparently without ever voicing to the participants that he deemed himself to be operating under any such constraint. Tr. at 2687. Moreover, his testimony as to whether he advised this Court of any such reservation when he concededly accepted this Court's designation to serve was self-contradictory. Tr. at 2460-64. In any event, whatever Mr. Sweeney's views were with respect to the conflict issue, this Court finds there is no basis in the record to conclude that Plaintiffs' Counsel were in fact required to withdraw as counsel under the relevant ethical rules.

4. **Time Period (iv):**
August 27, 1993 Through October 12, 1993

334. A full description of the relevant events that transpired during the period of time from August 27, 1993 through October 12, 1993 is set forth in Findings of Fact ¶¶ 182-186.

335. This Court finds that, during the period of time between August 27, 1993, when the Global Settlement agreement in principle was announced in open court, and October 12, 1993, the day on which the Trilateral Settlement Agreement was executed, Plaintiffs' Counsel conducted themselves in accordance with the relevant ethical principles and did not violate any rules of professional responsibility. Tr. at 2339. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement Agreement. Findings of Fact ¶¶ 181-187.

336. In its original Order designating Professor Green as Attorney Ad Litem, this Court expressly recognized that the role of Plaintiffs' Counsel in representing asbestos claimants other than those who are members of the Global Health Claimant Class could give rise to assertions of conflicts in connection with their representation of the class members. Pacific Exh. 2. This Court undertook to appoint Professor Green based, in part, upon this Court's determination that it was not feasible to require Plaintiffs' Counsel to have fully settled all of their present cases. Pacific Exh. 2. Professor Hazard testified that the appointment of Professor Green was a "very prudent, appropriate measure of additional scrutiny and concern for the interests of the claimants," Tr. at 2350, and Professor Leubsdorf acknowledged that this appointment provided additional protection to the Global Health Claimant Class. Tr. at 1879-80.

5. Time Period (v): October 12, 1993 Through December 23, 1993

337. A full description of the relevant events that transpired during the period of time from October 12, 1993 through December 23, 1993 is set forth in Findings of Fact ¶¶ 186-189.

338. With the execution of the Trilateral Settlement Agreement on October 12, 1993, Fibreboard and the Insurers had concluded a separate agreement that, if it received court approval, would trigger the back-end payments for Plaintiffs' Counsel's present clients whether or not a global settlement was ever finally documented and judicially approved. It was from this date until December 23, 1993, the date on which the Global Settlement Agreement was executed, that Plaintiffs' Counsel, Fibreboard and the Insurers negotiated the specific terms of what became the written Global Settlement Agreement, the Trust Agreement and the TDP. This Court agrees with Professor Hazard's conclusion that, during this period of time, Plaintiffs' Counsel's conduct did not result in a conflict of interest on their part, or otherwise violate any applicable ethical standards or rules. On the contrary, the credible evidence reflects that during this period of negotiations Plaintiffs' Counsel preformed in a "very professional way." Tr. at 2341-42.

6. Conflict of Interest: Concluding Findings

339. This Court finds that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel's concurrent representation of present and future claimants, and that Plaintiffs' Counsel at all times acted ethically and in accordance with their professional obligations. The Court finds further that Plaintiffs' Counsel reasonably believed in light of the circumstances, that their representation of the Global Health Claimant Class would not be adversely or materially affected by their representation of or duty to their other present and former clients. Indeed, the evidence clearly reflects, and the Court finds, that at all times negotiations among Plaintiffs' Counsel, Fibreboard and the Insurers were contentious, hard-fought and conducted in good faith at arm'slength. Findings of Fact ¶¶ 117-189. Professor Green reached the same conclusions, and noted that the negotiations were frequently marked by disagreements among the negotiating parties and among Plaintiffs' Counsel themselves. Tr. 2744.

340. A number of the discussions and negotiating sessions that led to the Global Settlement were conducted under the auspices of Judge Higginbotham, in his role as Settlement Facilitator, who kept this Court informed of the progress of negotiations throughout the Spring and Summer of 1993. Tr. at 1099-1101. Moreover, on August 26 and 27, 1993 this Court observed firsthand the contentious, arm's-length nature of the negotiations. Tr. at 1458-72. Accordingly, this Court finds that the record is devoid of any evidence that Plaintiffs' Counsel compromised the interests of the Global Health Claimant Class members so as to benefit their other clients. Tr. at 1557-59.

341. The evidence reflects that circumstances have substantially changed since August 27, 1993, such that renegotiation of the Global Settlement by a different set of attorneys at this point in time would likely result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement. Findings of Fact ¶¶ 269-272.

342. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick adequately, professionally, and ethically represented the interests of the Global Health Claimant Class members. This Court further finds that at all times during the relevant periods of settlement discussions and negotiations, the conduct of Plaintiffs' Counsel fully comported with the applicable standards of legal ethics and professional responsibility. This Court further finds that the record is devoid of any evidence suggesting either that Plaintiffs' Counsel failed to represent zealously and loyally the interests of the Global Health Claimant Class members or otherwise compromised the interests of that class in order to benefit any other client or group of clients.

B. Alleged Intraclass Conflicts

343. The Ortiz Intervenors assert that intraclass conflicts exist between each of the following pairings of groups of Global Health Claimant Class members: (i) class members who were first exposed to asbestos-containing products prior to March 15, 1959, and those who were first exposed after that date; (ii) class members who have already suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (iii) class members who will be individually represented in filing their claims against the

Trust by Plaintiffs' Counsel (some of whow are also members of the Select Counsel for the Beneficiaries ("SCB")), and those class members whose individual attorneys are not members of the SCB. Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 28, 1994); Tr. at 1778-87. The Ortiz Intervenors' expert, Professor Leubsdorf, acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of Global Health Claimant Class members. Tr. at 1886-87.

344. In general, the Court finds the Professor Leubsdorf's testimony on these points lacks credibility. Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests. The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct. See, e.g., Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Indeed, were Professor Leubsdorf correct, new negotiating counsel would have to have been added and dropped from the team repeatedly throughout the negotiating process as Fibreboard and the Insurers proposed and then withdrew proposals that might arguably (when viewed in hindsight) favor one subgroup over another.

345. Based on the credible evidence presented, this Court finds that there have been and continue to be no intraclass conflicts within the Global Health Claimant Class such that either subclassing or separate negotiating attorneys were or are now required. Moreover, this Court finds that the common interests of the class members far outweigh any differing interests that they may have.

346. The Court finds that the Global Health Claimant Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorney's fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

1. Alleged Conflict Between Pre-1959 and Post-1959 Claimants

347. The Ortiz Intervenors' suggestion that the distinction between pre-1959 and post-1959 claimants creates an impermissible conflict for Plaintiffs' Counsel seeks to draw upon a historical vestige of Fibreboard's insurance dispute. Although there are many reasons why claims arising from earlier

exposure to Fibreboard's products tended to be of greater value (including the fact that those claimants generally had more extensive exposure to Fibreboard asbestos and suffered from more severe disease, and the fact that Fibreboard's liability to those claimants was shared among fewer solvent defendants, Findings of Fact ¶ 26), the pre-1959 versus post-1959 dividing line in actuality stems from the cutoff point in coverage under the Continental policy.

348. Before 1992, the lack of insurance coverage for post-1959 claims was a given, but not a disqualifying conflict. In the past, counsel representing individuals with claims against Fibreboard, including Plaintiffs' Counsel, have represented both claimants with pre-1959 claims and claimants with post-1959 claims. The Ortiz Intervenors do not maintain that this created an impermissible conflict. Leubsdorf Tr. at 1933.

349. Before the Settling Parties agreed upon how to treat pre and post-1959 claims in the Global Settlement, several events had vitiated any logic for perpetuating the preand post-1959 insurance-based distinction. First, the Pacific II Agreement had (contingent on subsequent rulings) provided for $330 million of insurance money for post-1959 claims (both existing and future). Fibreboard Exh. 905. Second, in the April 9 Agreement, Continental agreed to negotiate for a global settlement that would resolve all claims (preand post-1959), and also agreed to pay the amounts due under the Pacific II Agreement were a global settlement to be reached. Tr. at 311-12; Fibreboard Exh. 908. Third, consistent with the April 9 Agreement, on August 27, 1993 the parties agreed upon a settlement that Plaintiffs' Counsel believed to be sufficient to

pay fair value to claims irrespective of the date of exposure. Tr. at 1043-47. Fourth, on October 12, 1993, the Insurers and Fibreboard entered into the Trilateral Settlement that, subject to court approval, makes money available to Fibreboard irrespective of the date of exposure. Fibreboard Exh. 910. Finally, the decision as to how to divide the settlement among class members did not take place until the negotiation of the TDP, which occurred after October 12. Tr. at 1953.

350. Accordingly and reasonably, Plaintiffs' Counsel negotiated the Global Settlement so that future asbestos-related personal injury claimants would be compensated irrespective of whether their claims arose from pre- or post-1959 first exposure to asbestos. Tr. at 653.

351. The Court rejects Professor Leubsdorf's testimony as to the existence of an impermissible conflict of interest between pre-1959 and post-1959 claimants because: (i) he lacks experience in mass tort cases and asbestos litigation; (ii) as described in these Findings of Fact, the credible evidence in the record does not support his factual predicate; (iii) his conclusion is entirely speculative and without foundation; (iv) his interpretation of the ethical rules would lead to highly impractical results that would provide no benefit to Global Health Claimant Class members, and would instead force them unnecessarily to face substantial risks; and (v) his conclusion is not grounded upon, and is in fact inconsistent with, applicable law. Of particular note was Professor Leubsdorf's admission at the fairness hearing that -- in forming his opinion -- he had not read the Pacific II Agreement or the April 9 Agreement, both of which materially affect the question of whether separate

representation for pre-1959 and post-1959 claimants was required. Tr. at 1892.

352. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, which this Court credits and accepts, the concurrent representation of pre-1959 claimants and post-1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict of interest. Tr. at 2342-45. Professor Hazard reasoned that before negotiations had begun, the Pacific II Agreement had rendered the interests of the pre-1959 and post-1959 claimants substantially similar, and that equality of treatment embodies a principle of fairness that would appeal to both groups. Tr. at 2344.

353. The Court accepts Professor Hazard's testimony that the concurrent representation of the pre-1959 and post1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict which disabled Plaintiffs' Counsel, and finds his reasoning persuasive. This Court finds that the Pacific II Agreement, the April 9 Agreement and the Trilateral Settlement Agreement removed the potential for differential treatment of the pre-1959 and post-1959 claimants in the context of a global settlement. Tr. at 2342-45; Fibreboard Exhs. 905, 908, 910.

354. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel were not ethically conflicted, and indeed acted vigorously, diligently, professionally and ethically in representing both pre-1959 and pre-1959 claimants.

2. Alleged Conflict Based

on "Cognizability" of Injury

355. The Global Settlement Agreement provides, inter alia, that claimants will not be entitled to any payment from the Trust on account of claims for punitive damages, damages in excess of Fibreboard's actual share of responsibility, damages for increased risk of cancer, pre-judgment interest or post-judgment interest, and that total payments arising from one individual's exposure to asbestos shall not exceed $500,000. The Global Settlement Agreement also contains certain spendthrift provisions. Findings of Fact ¶¶ 200-202.

356. Class Counsel believed that the abovedescribed provisions would benefit the Global Health Claimant Class as a whole, because class members who do not suffer compensable injury until well into the future have an interest in provisions that increase the likelihood that funds will be available to pay their claims. Tr. at 914-15. Based on the record before it, the Court finds that this belief was well founded.

357. The Ortiz Intervenors argue that Plaintiffs' Counsel's concurrent representation of all future claimants created an impermissible conflict of interest on their part, where -according to the Ortiz Intervenors' expert -some of them have already suffered "legally cognizable" injury and some of them have not. Tr. at 1784. The Ortiz Intervenors offered Professor Leubsdorf as an expert witness on this issue.

358. As an initial matter, the Court observes that it has already found that all members of the Global Health Claimant Class have "legally cognizable" injuries in the sense that they all satisfy the requirements for subject matter jurisdiction. Findings of Fact ¶¶ 1-5. Accordingly, to the extent the Ortiz Intervenors intend in their objection to use "legally cognizable" in this sense, their objection is found to be meritless as it is based on a factual premise -that there are some class members without "legally cognizable" injuries -that this Court has already rejected. Hereafter the Court will address the Ortiz Intervenors' argument on this point on the assumption that by a "legally cognizable" injury what is in fact meant is a presently manifested asbestosrelated injury, such that a person with such an injury is -in the words of Professor Leubsdorf -"going to present their claims within a rather short time." Tr. at 1785.

359. Professor Leubsdorf testified that, in his opinion, the concurrent representation of these groups was inappropriate because, according to him, Global Health Claimant Class members who have already suffered a "legally cognizable" injury have an interest in securing recovery free of limits such as are imposed by the Global Settlement. At the same time, according to Professor Leubsdorf, Global Health Claimant Class members who have not already suffered "legally cognizable" injury have a conflicting interest in seeking such limits, in the hope of preserving funds available to pay their claims. Tr. at 1784-86.

360. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, Plaintiffs' Counsel's concurrent representation of future claimants who

had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest. Professor Hazard reasoned the issue does not present a question of ethics or a conflict of interest. Tr. at 2348-49.

361. The Court accepts Professor Hazard's testimony that Plaintiffs' Counsel's concurrent representation of future claimants who had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest that disabled Plaintiffs' Counsel. The Court finds the credible evidence reflects that (i) during the process of negotiations there was no competition for insurance funds between these two groups of claimants; (ii) all Global Health Claimant Class members had an equal interest in settling their claims and avoiding the risk of the Coverage Case appeal; and (iii) any demarcation between groups of class members based on the time an injury becomes "cognizable" or manifested is purely arbitrary. Tr. at 1888-89, 1923-25. Furthermore, this Court finds that the interest of the two subgroups at issue here coincide to a far greater extent than they diverge. For example, both subgroups equally share the risk of a loss of the Coverage Case that might result were no settlement to be reached, equally share the desire for a fair and equitable settlement, and equally share the interest in preserving funding for all class members.

362. Based on the credible evidence, this Court rejects Professor Leubsdorf's conclusion as to the existence of an impermissible conflict of interest between these groups of class members because: (i) he lacks practical experience in mass tort cases and asbestos litigation; (ii) his application of ethical rules leads to highly impractical results that provide no benefit to Settlement Class Members and instead

create substantial risks to Settlement Class Members; and (iii) his conclusion is not grounded upon and is in fact inconsistent with applicable law.

363. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel did not have a conflict of interest, and indeed acted vigorously, diligently, professionally, and ethically in representing both the Global Health Claimant Class members who had already suffered a "legally cognizable" injury and those who had not.

3. Alleged Conflicts Relating to SCB

364. The Trust Agreement provides for a group of attorneys to serve as Select Counsel for the Beneficiaries ("SCB"). The duty of the SCB members is to represent the interests of the Global Health Claimant Class members consistent with the purposes of the Trust. As the Trust Agreement was originally written, Plaintiffs' Counsel (together with several other attorneys) were to serve as the initial SCB. The SCB duties specifically include giving prior approval (by a majority vote) on a variety of Trust matters, including amendment or waiver by the Trustees of certain provisions of the Trust Agreement or TDP, and the filling of vacancies in the Class A and Class B Trustee positions.

365. The Ortiz Intervenors argued that service on the SCB by asbestos lawyers representing claimants against the Trust presents an impermissible conflict of interest. They offered Professor Leubsdorf as an expert witness on this issue. Professor Leubsdorf testified that, in his opinion, there exists the

possibility that Global Health Claimant Class members individually represented by an SCB member might receive better treatment from the Trust than those class members who are not represented by SCB members, either because low-level employees of the trustees might give preferential treatment to class members represented by SCB members out of concern for their jobs, or because trustees of the Trust might "wink at" preferential treatment of the clients of the SCB members if they believed that unless they permitted such preferential treatment, the SCB members would not approve certain decisions that were necessary to accomplish the purposes of the Trust. Tr. at 1782-84.

366. Professor Hazard testified that the risk that SCB members will use their status as such to seek an unfair advantage for their individual clients at the expense of the other members of the Global Health Claimant Class is insignificant for the following reasons: (i) it is to be assumed that the trustees will honor their fiduciary responsibilities to the class; (ii) the continuing scrutiny of the claims handling process will deter misconduct; (iii) SCB members have little to gain and much to lose by engaging in illegal or improper conduct, and thus it is not in their interest to engage in any misconduct that would cast doubt on the legitimacy of either their role as SCB members or as attorneys for individual claimants; and (iv) this Court has continuing jurisdiction over this action, and will be receiving an annual accounting of Trust-related activities that will be publicly available such that persons who believe the trustees are acting in any way contrary to the interests of the beneficiaries may bring those facts to the attention of this Court. Tr. at 2346-47.

367. This Court in a Memorandum to the Parties of March 30, 1995 expressed the view that the Global Health Claimant Class would be better served by an SCB that avoided even the appearance of impropriety, although the negotiations of the SCB provision did not undermine Plaintiffs' Counsel's ability to represent the Class fairly and adequately, and Plaintiffs' Counsel did not advocate those provisions during negotiations based on self-interest or other inappropriate motive. The Court expressed reservations, consistent with concerns of the Guardian Ad Litem, about provisions of the original Trust Agreement that required unanimous concurrence of all other SCB members to remove a member, that permitted SCB members to serve until they die, resign, or are removed, that gave SCB members the power to select their replacements, and that allowed SCB members both to represent claimants before the Trust and to seek removal of trustees and select replacement trustees. The Court advised that it had decided to withhold approval at that time, invited the settling parties to consider amending the SCB provisions, and suggested procedures for the Settling Parties to consider.

368. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Amendment") as of May 15, 1995. The Third Amendment changed the SCB provisions to address the Court's concerns. One, the composition, terms of service, removal, and replacement provisions have been changed. As amended, the SCB consists of five lawyers. The Class A member will be a representative of organized labor. The Class B and C members will be individuals who do not represent individual plaintiffs in asbestos personal injury litigation. The Class D and E members will be lawyers with experience representing plaintiffs with

experience representing plaintiffs in asbestos personal injury litigation, including those with Interim Claims before the Trust. Initial terms are two years for the Class A member, four years for the Class B and C members, and five years for the Class D and E members. Thereafter, each SCB member serves a five-year term. Any SCB member may be removed by the Court on application of any other member, any trustee or any trustor. Vacancies in the Class A position will be filled by the AFL/CIO. Vacancies in the Class B, C, D and E positions will be filled by votes of law firms that have liquidated claims with the trust during the preceding two fiscal years, with one vote per $100,000 in aggregate liquidated amount of claims. The Class D and E members will come respectively from the western and eastern halves of the United States and will be elected, separately, by law firms with their principle places of business in the area from which they come. Two, only Class D and E members may represent beneficiaries before the Trust, and only Class A, B and C members may vote on removal or appointment of trustees.

369. The provisions adopted by the Third Amendment regarding SCB members satisfy the Court's concerns. The Guardian Ad Litem has advised that the provisions are a wise and appropriate response to the concerns that he and the Court raised, and that he supports the Third Amendment and recommends approval of the Global Settlement, as amended. These provisions were the subject of notice, and a hearing was held on June 20, 1995. No intervenor objected to them, and the Court received no other objection of substance. The Court finds that the SCB provisions, as amended, avoid even the appearance of impropriety, and remove the possibilities that some future SCB member may use

his or her powers to gain an unwarranted advantage for claimants whom he or she represents, or that such undue influence may impugn the reputation or integrity of the Trust.

C. This Court's Consent

370. Even if this Court were to find -- which it does not -- that Plaintiffs' Counsel's representation of the Global Health Claimant Class was such that it may have been materially limited by their other responsibilities, this Court finds that the representation was ethical because (i) Plaintiffs' Counsel reasonably believed that the representation was not adversely affected; (ii) the members of the Global Health Claimant Class would undoubtedly have consented to the representation had it been possible to consult them; and (iii) this Court's careful scrutiny of the settlement and the process by which it was negotiated, is, as Professor Hazard testified, an effective substitute for that consent in the context of a class action settlement. Tr. at 1024-25, 1192-93, 2340-41. The Court would therefore consent on behalf of the Global Health Claimant Class to the representation of the Class by Class Counsel, subject to amendment of the SCB provision of the Trust Agreement as discussed above. See Findings of Fact ¶¶ 364-369.

371. Indeed, given the eminent fairness of the Global Settlement, and in view of the specific factors set forth below, this Court finds that it would be wrong to label Plaintiffs' Counsel's zealous representation as unethical, or to deprive the class members of the substantial benefits of the settlement, solely because the members of the class were so numerous that

it was impossible to obtain informed consent to the representation from each individual class member.

372. In making this finding the Court relies on the following further findings:

> --There is no credible evidence in the record that the alleged material limitation on the representation resulted in any prejudice to the Global Health Claimant Class or otherwise materially impaired Plaintiffs' Counsel's representation of the class. The Ortiz Intervenors' entire presentation to the Court consists of unsubstantiated speculation that other, ostensibly unconflicted counsel "might" have gotten a better deal and that this Court's fairness review cannot eliminate that possibility. Tr. at 1777-78, 1837, 1856-57, 1868, 1901. Indeed, Professor Leubsdorf conceded that he was unaware of any actual prejudice that the members of the Global Health Claimant Class had suffered as a result of the alleged conflicts. Tr. at 1901.
>
> --Plaintiffs' Counsel acted vigorously and diligently in representing the Global Health Claimant Class and believed that they were acting in the best interests of the Global Health Claimant Class as a whole. Findings of Fact ¶¶ 296, 315, 326, 328, 331, 342, 354, 363.
>
> --Plaintiffs' Counsel's representation of present claimants against Fibreboard redounded to the advantage, rather than the disadvantage, of the Global Health Claimant Class. Findings of Fact ¶ 329.

--There is no credible evidence of the existence of other "conflict-free" counsel who were qualified to negotiate a fair, reasonable and adequate global settlement. Findings of Fact ¶¶ 317-324.

--Had there been as many separate attorneys representing the Global Health Claimant Class as Professor Leubsdorf opined that there should have been, there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal. Tr. at 1558-59, 1917, 2345.

--There is no evidence that Global Health Claimant Class members would have benefited in any way from representation by allegedly "conflict-free" counsel.

--The overwhelming majority of the members of the Global Health Claimant Class, including the class representatives, have not objected to the alleged conflicts of interest. Findings of Fact ¶ 203.

--The Guardian Ad Litem has independently scrutinized the settlement negotiations and is satisfied that Plaintiffs' Counsel "exhausted every possible benefit they could get for the Class" and that the settlement is a "very good deal." Tr. at 2786-88.

--The Global Settlement is more favorable to the Global Health Claimant Class than the Trilateral Settlement. Findings of Fact ¶¶ 231-243.

--Because of changed circumstances, there is a substantial risk that a renegotiation of the Global Settlement today would result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement that was in fact concluded. Findings of Fact ¶¶ 269-272.

--The Global Settlement is fair, reasonable and adequate from the standpoint of members of the Global Health Claimant Class. Findings of Fact ¶¶ 191-204.

D. Fees

373. In mid-June 1993, Messrs. Rice and Cox met with Messrs. Wachtell and Koplow in Washington, D.C. At that meeting several issues were discussed in connection with the costs of administering a global settlement were one to be reached including the question of legal fees for Plaintiffs' Counsel. Mr. Wachtell raised the subject of legal fees in the context of his firm's experience in securities fraud cases, making clear that Continental would not be prepared to pay a fee to class counsel in a Fibreboard class action settlement that would approach the 25% fees sometimes awarded class counsel in securities fraud class actions. Mr. Wachtell stated that he would recommend to Continental that it agree to pay Plaintiffs' Counsel's fees up to a capped amount of 3% of the settlement amount, were such fees to be awarded by the Court and affirmed upon any appeal. The issue of Plaintiffs' Counsel's fees had not been discussed with Continental at this point, and Mr. Koplow made it clear to Messrs. Rice and Cox that even the 3% figure would have to be discussed with and agreed to by Continental. Mr. Rice made it clear that any fee, whatever the

amount, would have to be paid separately from, and not out of the proceeds of, the settlement fund. Tr. at 111012, 1387-93, 1590-91.

374. Plaintiffs' Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not assume that any particular fee would be awarded to them by this Court. Tr. at 672, 1592.

375. Further discussions between the Insurers and Plaintiffs' Counsel regarding Plaintiffs' Counsel's fees did not occur again until August 1993. Tr. at 1591. On August 27, 1993 -- when the Global Settlement agreement in principle was announced in open court -- the Settling parties set forth their agreement that (i) should this Court award Plaintiffs' Counsel fees, those fees would be paid by the Insurers as an additional obligation separate from their obligation to fund the Global Settlement itself, and would not be paid out of the Global Settlement fund; and (ii) the Insurers' obligation to pay such fees would be capped at 3% of the settlement amount. Fibreboard Exh. 592.

376. This Court finds that there is no credible evidence that Plaintiffs' Counsel were promised, or could assume that they would receive, any particular amount of attorneys' fees in connection with their service as counsel to the Global Health Claimant Class. In addition, the Court finds that there is no credible evidence that the amount of the attorneys' fees Plaintiffs' Counsel might receive in connection with this action had any negative effect whatsoever on their effectiveness as vigorous advocates for the interests of the Global Health Claimant Class.

XIII. GUARDIAN AD LITEM

377. Plaintiffs' Counsel have been heavily involved in representing asbestos-related personal injury claimants, including claimants who are not members of the Global Health Claimant Class, over the last ten to twenty years. See Findings of Fact ¶ 293. Because this fact could give rise to assertions of conflicts of interest in connection with Plaintiffs' Counsel's representation of the Global Health Claimant Class, on October 12, 1993, this Court appointed Professor Eric D. Green, of the Boston University School of Law, to serve as Attorney Ad Litem on behalf of the Global Health Claimant Class. Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993).[34]

378. Professor Green is fully knowledgeable in asbestos mass tort matters, and has served as Special Master in many such litigations,[35] but has not represented asbestos

---

[34]Subsequently, by Order dated March 15, 1994, this Court changed Professor Green's designation to "Guardian Ad Litem" and provided him with judicial immunity from suits related to his activity in this lawsuit. Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994).

[35]Professor Green has served in the following capacities: Special Master, N.D. Ohio, Ohio Asbestos Litigation; Special Master, D. Mass., Massachusetts Asbestos Litigation; Special Master, D. Conn., Connecticut Asbestos Litigation; Special Master, Massachusetts Superior Court, State Asbestos Litigation; Advisor to the Trustees of the Manville Personal Injury Settlement Trust. Tr. at 2715-17; Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, Professor Green was asked by the Administrative Office of the United States Courts to perform a study of methods of handling asbestos litigation, and he completed that study in the mid-1980s.

(continued...)

claimants. He has taught at Boston University School of Law for seventeen years, where his principal areas of academic involvement have been dispute resolution and evidence. He has also taught constitutional law, legal ethics and legal process. In addition, Professor Green ha been a mediator since 1977, conducting mediations and facilitating settlements in thousands of cases, including personal injury, toxic tort and environmental cases. As part of that practice, Professor Green teaches and writes about the negotiating process. He has also participated with members of the judiciary and the bar at numerous conferences concerning litigation, settlement and alternative dispute resolution generally, and asbestos litigation in particular. Report of the Guardian Ad Litem ("Guardian's Report) at 2-4; Tr. at 2717-18.

379. As stated in this Court's Order appointing Professor Green, "the Court is of the view that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the [Global Health Claimant] Class and thereby to afford the Class additional assurance that their interests will be adequately protected." Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, this Court directed Professor Green "to render a report to the Court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of members of the provisionally certified Class and advise the Court from the point

---

(...continued)
Tr. at 2715-17.

of view of Class members as to such further aspects of this proceeding as the Guardian Ad Litem deems appropriate or as the Court may request." Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994). Professor Green was identified in the Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing sent to class members, and a post office box address was set forth therein so that class members could send any comments they might have directly to Professor Green. Continental Exh. 28.

380. In carrying out this appointment, Professor Green closely reviewed both the history of the negotiations that led to the Global Settlement, as well as the result of the negotiations as embodied in that settlement, to determine whether the settlement was the result of fraud or collusion on the part of any of the parties to the Global Settlement. Professor Green carefully considered the history and possible future of asbestos-related litigation in general, Fibreboard's involvement in asbestos-related litigation in particular, and the insurance coverage litigation between Fibreboard and the Insurers. He considered the prospects and procedures that would be faced by future asbestos claimants in the tort system, including the litigation strategies that may be adopted by the parties, the transaction costs and delays involved in the tort system, and the potential impact of bankruptcy. Professor Green compared the results to be had under the tort system with the claims evaluation and dispute resolution procedures provided under the TDP. Guardian's Report at 4-5; Tr. at 2719-21.

381. Professor Green also assessed the range of possible recovery by the members of the Global Health

Claimant Class, and in doing so considered three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement and disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements, with resultant reliance on the outcome of the Coverage Case. In considering these scenarios, Professor Green also took into account: (i) the various projections of the likely number of future claims for personal injuries caused by Fibreboard asbestos, the methods of setting a range of values for those claims, and the amount of funds available to compensate those claims under the Global Settlement; (ii) the impact on the Global Health Claimant Class of provisions in the Global Settlement Agreement that restrict the rights of class members that would otherwise be available in the tort system; and (iii) the impact of the Global Settlement on various segments of the Global Health Claimant Class, including those who have already-existing claims, those whose diseases will not be diagnosed for many years, those whose first exposure to Fibreboard asbestos was before March 15, 1959, those whose first exposure was after that date, those who have contracted or will contract more serious asbestos-related diseases, and those whose diseases are or will be less severe. Guardian's Report at 5-6; Tr. at 2721-22.

382. Professor Green also considered the possibility that, were the Coverage Case appeal to go forward, such appeal could result in a decision adverse to Fibreboard (and thus adverse to the members of the Global Health Claimant Class). Professor Green also considered the financial resources that are likely to be available to compensate class members under the Global Settlement as compared to the resources available to the class under the Trilateral Settlement, including

an assessment of the gross funds generated under each settlement as well as the net funds likely to be received by class members. This involved an analysis of the transaction costs involved in each alternative settlement scenario, and the value of Fibreboard itself. Guardian's Report at 6; Tr. at 2723.

383. Professor Green also took into account the opinions of Plaintiffs' Counsel, the class representatives and other members of the Global Health Claimant Class. In doing so he (i) carefully considered the views of Plaintiffs' Counsel as expressed in their testimony and in private interviews he conducted; (ii) carefully considered the statements of the class representatives in their depositions, pleadings and private interviews; (iii) reviewed every letter sent to him by class members, considered comments made by class members in private interviews, and took into account the contents of all objections and motions to intervene filed by class members; and (iv) considered statements made on the record by counsel for the intervenors and objectors and comments provided to him in private interviews. Professor Green also considered the views of other members of the plaintiff's bar in many private interviews, and the reactions to the settlement expressed by various groups such as the AFL CIO, the White Lung Association and others. Guardian's Report at 6; Tr. at 2723-24.

384. To assist him in this undertaking, Professor Green enlisted the assistance of James Ryan (a former worker's compensation judge) and Professor Dwight Golann. Professor Green was also aided by a registered nurse/attorney with experience in the health care field, and by a research associate. To assist in his understanding of the epidemiological evidence presented in the case, Professor Green retained a

professor in epidemiology and biostatistics at the Harvard School of Public Health as an expert consultant. Professor Green also consulted with an expert in civil procedure in evaluating the impact of the settlement on joint and several liability, contribution and indemnity issues as they could affect Global Health Claimant Class members, and informally consulted with other experts regarding financial questions such as the likely return to the Trust on the Trust's assets. Guardian's Report at 7-9; Tr. at 2726, 2728.

385. Professor Green and his team personally attended or otherwise participated in almost every court conference or hearing held since his appointment, and he has reviewed the transcript of every proceeding conducted in this case before his appointment. Professor Green participated in the hearing regarding the providing of notice to the Global Health Claimant Class, reviewed all the notice documents and the notice dissemination plan, and provided comments to the Court and to the Settling Parties regarding the text of the notice and the method of its dissemination. Professor Green attended all eight days of the fairness hearing in this action, and frequently asked questions of the witnesses. Professor Green and his colleagues fully participated in all discovery, attended all depositions, frequently asked questions, and received and reviewed all documentary discovery produced by the Settling Parties (over 827 documents totaling over 17,500 pages). Professor Green has stated that he "found the settling parties to be a hundred percent cooperative with all [his] requests" for information. Tr. at 2727-28. He and his staff also received and reviewed all of the pleadings, motions, memoranda and briefs in this case. Guardian's Report at 8-13; Tr. at 2726-27.

386. Based on these efforts, as well as his experience, Professor Green set forth his views both orally at the fairness hearing and in a 92-page report to this Court. First, Professor Green stated that the members of the Global Health Claimant Class share a desire for fairness (including a belief that more seriously ill claimants should be paid first), certainty of funding, fast and simple claims processing, and protection for all class members. Of the several hundred comments received from class members, only 23 expressed any opposition to the Global Settlement, and most of those were based on misconceptions regarding the functioning of the settlement. Guardian's Report at 13-18; Tr. at 273642.

387. Second, Professor Green found no evidence of fraud or collusion, either with regard to the value of the settlement, the class definition (including the "cut-off date" element of that definition), the TDP or the valuation of cases. It was his view that no benefit to Plaintiffs' Counsel from the settlement at the expense of others had been identified or proved. Professor Green scrutinized the settlement for evidence that the interests of the Global Health Claimant Class might have been sacrificed by Plaintiffs' Counsel for their own benefit or the benefit of their other clients. He detected no evidence of this. To the contrary, Professor Green was of the view that the Global Settlement negotiations were conducted at arm's length by experienced and capable counsel, and that the negotiations were in fact frequently marked by conflict among the various parties. Guardian's Report at 20-27; Tr. at 2744, 2747.

388. Third, Professor Green expressed the view that the creation of the Trust by the Global Settlement relieves the class members of the risk of a loss by Fibreboard of

the Coverage Case appeal, the risk that Fibreboard's assignment program might be found to have vitiated the policy coverage, and the risk of a Fibreboard bankruptcy that would likely result if the Coverage Case were lost in whole or in part by Fibreboard. Professor Green determined that the use of a trust would greatly reduce the transaction costs -especially attorneys' fees -that would be incurred in the tort system, and that the net amount to be received by class members would be greater under the Global Settlement than under a corresponding settlement in the tort system. He also expressed the view that the procedures under the TDP are fair and reasonable, including the spendthrift provisions and the definition and prioritization of five disease categories, and that the TDP should enable class members to obtain compensation in a faster and more rational manner than would be provided in the tort system. In particular, Professor Green expressed the view that the claims management and dispute resolution procedures of the Trust are designed to and will promote the prompt, inexpensive and fair resolution of claims. Guardian's Report at 28-29, 35-38; Tr. at 2748-51.

389. Fourth, Professor Green stated that the Select Counsel for the Beneficiaries is a useful device for ensuring that the Trust provides fair and equitable compensation to class members. Nevertheless, he expressed the view that any attorney who prosecutes claims against the Trust should not also serve on the SCB. Professor Green noted that as Guardian Ad Litem he was not empowered to compel amendment of the Global Settlement Agreement and stated that, he would urge approval even if no such limitation on who may serve on the SCB were adopted. Guardian's Report at 89-91; Tr. at 2753-55. Subsequent to the fairness hearing, and in resoponse to the concerns expressed by Professor Green and by the Court, the

Settling parties agreed to the Third Amendment to the Trust Agreement ("Third Amendment") as set out in Findings of Fact ¶ 368. Professor Green advised the Court that the third Amendment ameliorated his major concerns regarding the appointment and powers of the SCB, and expressed the opinion that "the Amendment adopted by the Settling parties was a wise and appropriate response to those concerns." Letter to Judge Parker from Eric D. Green, dated June 12 1995.

390. Fifth, Professor Green identified several areas in which the members of the Global Health Claimant Class had given up rights in exchange for achieving the Global Settlement. In each instance, however, he concluded that it was reasonable for the class to have done so:

> --The class releases certain rights to recover against Fibreboard and the Insurers, and thus bears the risk that the settlement funds might be insufficient. However, Professor Green believes that this is reasonable in light of the amount of money provided for by the Global Settlement and the other benefits achieved thereby. Guardian's Report at 28-30; Tr. at 2755-56.
>
> --The class members are not permitted to opt out of the Global Settlement; however there is a right to exit to the tort system at the back end of the process that lessens the effect of this provision. Guardian's Report at 30; Tr. at 2756.
>
> --Class members are barred from recovering punitive damages, judgments in excess of $500,000 in a single case, preand post-judgment interest, and judgments that

impose joint and several liability. Professor Green found, however, that punitive damages and judgments greater than $500,000 have rarely been awarded against Fibreboard, that settlements generally do not provide for the payment of interest, and that all of these limitations on the right to recover damages -- including the right to recover under a theory of joint and several liability -- benefit the class as a whole by maximizing the likelihood that funds will be available to pay all claimants. Guardian's Report at 30-32; Tr. at 2756-59.

391. Professor Green also carefully assessed whether it is fair, under the Global Settlement, that Fibreboard not pay more money into the settlement fund. He concluded that Fibreboard had contributed substantially to the settlement by managing the developing its disputed insurance coverage into a very valuable asset, and then transferring that asset to the Global Health Claimant Class. Guardian's Report at 34; Tr. at 2760-61.

392. Professor Green further concluded that, despite the work done by Drs. Nicholson, Peterson and Vasquez, one cannot predict with any confidence the number of future claims against Fibreboard. This is due to the number of key assumptions that must be made -- such as regards propensity to sue and the incidence of nonmalignancies -- and the range in those assumptions. Accordingly, Professor Green's assessment of the fairness and reasonableness of the Global Settlement is not premised on the accuracy of any particular prediction as to the number of future claims. Guardians' Report at 38-54; Tr. at 2761-64.

393. Professor Green analyzed the benefits and risks to the class under three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement but disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements (and thus reliance on the outcome of the Coverage Case). He concluded that -- with respect to the third scenario -- there is a substantial risk of reversal by the California Supreme Court of the California Court of Appeal's decision, and that, even if that risk were small, the result of such reversal would be so catastrophic for members of the Global Health Claimant Class that the risk should not be taken. Accordingly, Professor Green concluded that "it would be extremely risky and potentially devastating and tragic if both the Global and Trilateral Settlements were ultimately rejected by the courts." Tr. at 2705; see also Guardian's Report at 56-76; Tr. at 2764-65.

394. Professor Green also concluded that a number of "nonmonetary" factors weigh in favor of finding the Global Settlement superior to the Trilateral Settlement. In Professor Green's view, the Global Settlement will mitigate or eliminate any "race to the courthouse" by plaintiffs' lawyers that might occur under the Trilateral Settlement, the result of which would be inequitable distribution of settlement funds to claimants. Professor Green also stated that Global Settlement will eliminate the "lottery effects" often seen in asbestos litigation, in which a seriously ill claimant may recover a little while a far less seriously ill claimant hits the jackpot. These lottery effects would be present under the Trilateral Settlement. Professor Green observed that the tort system itself may change significantly in the next five to ten years, creating uncertainty as to the ability of claimants to recover for products liability claims

in the tort system. The Global Settlement eliminates this uncertainty. Guardian's Report at 76-78; Tr. at 2769-70.

395. Professor Green concluded that formal subclasses are not required. That conclusion was based on his view that, to the extent that various subgroups within the Global Health Claimant Class might have conflicting interests, those conflicts are far less significant than the common interests shared by those same subgroups -- the most overwhelming of which is their common interest in avoiding the risk of a loss by Fibreboard in the Coverage Case. Guardian's Report at 78-86; Tr. at 2771-85.

396. Professor Green expressed the view that the Global Health Claimant Class was fairly and adequately represented both by the class representatives and by Plaintiffs' Counsel. In particular, Professor Green emphasized the extensive experience Plaintiffs' Counsel brought to this matter -- and the importance to the Global Health Claimant Class of that experience -- as well as the unending vigor with which they pursued settlement benefits on behalf of the class. Professor Green agreed with the opinion of Professor Hazard that the contingent back-end payments to be paid under the Substitute Ness Motley Agreement only served to cause Plaintiffs' Counsel to redouble their efforts to achieve the best possible settlement for the class. Guardian's Report at 86-89; Tr. at 2785-88.

397. In conclusion, Professor Green stated that the Global Settlement is fair, reasonable and adequate, and should be approved. Guardian's Report at 91-92; Tr. at 2788-89.

XIV. LONGSHORE SETTLEMENT

398. Under LHWCA, certain employers and their insurance carriers (collectively, "Longshore employers") are required to provide compensation to their employees to or certain family members of those employees for injuries and death arising out of their employment. 33 U.S.C. §§ 903(a) and 904(b). In return for requiring a Longshore employer to pay this compensation, LHWCA grants the Longshore employer a number of specific benefits and protections, including the right (under specified circumstances) to "set off" against the Longshore employer's LHWCA obligations any recovery a Person entitled to compensation may obtain in a lawsuit against a third party arising out of the same injury that gives rise to the LHWCA claim. 33 U.S.C. § 933(f). Where the person entitled to compensation recovers as much or more from the third party as the employee would have received from his or her employer under LHWCA for the same injury, then the Longshore employer owes that employee no LHWCA benefits. Id. In addition, if the Longshore employer has already paid LHWCA benefits to the person entitled to compensation prior to the employee's recovery of damages from the third party for the same injury, then the Longshore employer is, by common law, entitled to lien rights against the employee's recovery for an amount equal to the prior payments.[36]

399. Title 33 U.S.C. § 933(g) is designed to prevent a Longshore employer from being wrongfully deprived

---

[36] See, e.g., Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 79 (1980), and cases cited therein; Bethlehem Steel Corp. v. Mobley, 920 F.2d 558, 561 (9th Cir. 1990).

of its set-off rights. Under this provision, if the person entitled to compensation obtains a judgment against a third party, or settles for an amount greater than the benefits to which he or she would be entitled under LHWCA, the person entitled to compensation must give the Longshore employer notice of such settlement or judgment. 33 U.S.C. § 933(g)(2). If the person entitled to compensation settles with a third party for an amount less than the LHWCA compensation, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and [sic] by the person entitled to compensation (or the person's representative)." 33 U.S.C. § 933(g)(1).

400. If a person entitled to compensation fails to comply with the applicable notice and approval provisions, "all rights to compensation and medical benefits under [LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits . . . ." 33 U.S.C. § 933(g)(2).

401. During the Fall of 1993, Plaintiffs' Counsel were concerned that Longshore employers might seek to use the execution and consummation of the Global Settlement as a justification for nonpayment of benefits to those members of the Global Health Claimant Class who are also persons entitled to compensation under LHWCA with respect to asbestos-related personal injuries that form that basis of the claims being settled in the instant class action. Specifically, Plaintiffs' Counsel were concerned that Longshore employers might assert that the Global Settlement and related judgment

constitute either (i) a settlement under § 933(g)(1) or (g)(2) of LHWCA as to which the Longshore employers had not been notified and given their approval; or (ii) a judgment under § 933(g)(2) of LHWCA as to which the Longshore employers had not been notified, with the result -in either case -that the affected members of the Global Health Claimant Class would forfeit their rights to compensation from the Longshore employers under LHWCA. Lockwood Aff. at ¶3.

402. Plaintiffs' Counsel believed that such an assertion by Longshore employers would fail as a matter of law. Out of an abundance of caution, however, Plaintiffs' Counsel negotiated for the inclusion in the Global Settlement Agreement of certain provisions intended to prevent the successful assertion of this argument by any Longshore employer. Specifically, § 2.2(B) of the Global Settlement Agreement provides: The claims of Persons providing workers com-ensation benefits to Settlement Class Members shall be directed to the Trust, instead of Fibreboard Corporation or the Insurers, and disposed of pursuant to the Trust Agreement and the Trust Distribution Process. Such Persons providing workers compensation benefits shall have existing remedies, whether by way of lien rights against a Settlement Class Member's Claim against the Trust, subrogation, direct action, or otherwise, against the Trust (instead of Fibreboard Corporation or the Insurers), subject only to the provisions of the Trust Agreement and Trust Distribution Process. Only payment of funds pursuant to a Settlement Class Member's individual settlement with the Trust, and not this Agreement (or the resulting Global Approval Judgment, dismissal and release), shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act (33 U.S.C. Section 933) and other similar

state and federal workers compensation provisions. Lockwood Aff. at ¶4; Fibreboard Exh. 912 (Global Settlement Agreement) at § 2.2B.

403. The Global Settlement Agreement further provides that it will become fully effective only upon "Global Approval Judgment" -a term defined in the Glossary annexed to the Global Settlement Agreement. As so defined, the requisite Global Approval Judgment (at paragraph i) includes a declaration by the Court "that, as provided in Section 2.2(B) of the Global Settlement Agreement, only payment of funds pursuant to the [Global Health Claimant] Class Members' individual settlements with the Trust shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act and other similar state and federal workers compensation provisions . . . ." Fibreboard Exh. 912 (Glossary) at ¶ 47(i).

404. Following the execution of the Global Settlement Agreement, motions to intervene in the instant class action were filed in the Spring of 1994 by (i) the Director, Office of Workers' Compensation Programs, United States Department of Labor; and (ii) Roland Dearborn and Kerwin Butcher, two employees who alleged that they sustained exposure to asbestos at a worksite subject to LHWCA, and Mr. Dearborn's wife, Judith Dearborn (collectively, the "Dearborn Intervenors"). The Director and the Dearborn Intervenors questioned whether the provisions of the Global Settlement Agreement and Global Approval Judgment described above would be effective to bind Longshore employers under the provisions of LHWCA. This Court thereafter granted intervention as a matter of right to the Director and permissive

intervention to the Dearborn Intervenors. Lockwood Aff. at ¶ 6; Motion by Roland Dearborn, Judith Dearborn and Kerwin Butcher to Intervene, Dkt. No. 136 (April 19, 1994); Motion to Intervene by Director, Workers' Compensation Programs, Dkt. No. 159 (May 11, 1994); Order Granting Motions to Intervene, Dkt. No. 178 (May 16, 1994).

405. Although Plaintiffs' Counsel disagreed with the positions taken by the Director and the Dearborn Intervenors with respect to the LHWCA issues presented by them, they decided to take still further steps to insure that the Global Settlement did not adversely affect and LHWCA rights held by members of the Global Health Claimant Class. Accordingly, on July 27, 1994, on leave of this Court, Plaintiffs' Counsel filed an amended complaint in this action which, inter alia, (i) added James Ellison as a representative of the Global Health Claimant Class; and (ii) asserted claims for declaratory and injunctive relief against Bethlehem, both in its individual capacity and as a representative of a class of Longshore employers and their insurers as defined in paragraph 49 of the Amended Complaint (the Longshore Defendant Class). In particular, the Amended Complaint sought a declaration that "the entry of Global Approval Judgment and/or consummation of the Global Settlement Agreement will not constitute a 'settlement' under 33 U.S.C. § 933(g) which would operate to create a forfeiture of the LHWCA compensation rights of Plaintiff Class members against members of the Longshore

Defendant Class." Lockwood Aff. at ¶ 7; Amended Complaint, Dkt. No. 304 (July 29, 1994).[37]

406. Following the filing of the Amended Complaint, Mr. Lockwood, as counsel to Plaintiffs' Counsel, engaged in extended arm's length negotiations with Mr. Bauman concerning a possible settlement of the LHWCA claims asserted therein against Bethlehem and the Longshore Defendant Class. There is no evidence or suggestion of any collusion or fraud in this process. In the course of those negotiations, Mr. Lockwood consulted with Plaintiffs' Counsel, counsel for the Director, counsel for other parties to the Global Settlement, counsel for the Dearborn Interventors, counsel for a group of Longshore employers on the West Coast, and counsel for at least one other member of the Longshore Defendant Class. In addition, Mr. Lockwood furnished copies of draft settlement documents being exchanged between him and Mr. Bauman to the other counsel described in this paragraph, and received their comments on those drafts. Lockwood Aff. at ¶ 9.

407. Mr. Bauman, in addition to his negotiations with Mr. Lockwood, also conferred with and sought input from several representatives of Longshore employers. In particular, Mr. Bauman consulted with Mr. Robert Babcock, an attorney who represents a cross-section of Longshore employers and who serves as President and Legal Advisor of the Longshore Claims Association, a not-for-profit association of approximately 130 maritime employers, carriers

---

[37]On February 9, 1995, the Court approved an amendment to the Longshore Settlement clarifying the definition of the Longshore Defendant Class. Order, Dkt. No. 731 (Feb. 9, 1995).

and third-party administrators. Mr. Babcock raised several legal issues on behalf of these clients, and these concerns were taken into account in the negotiations. Bauman Aff. at ¶ 3.

408. At the conclusion of the negotiations described above, the Global Health Claimant Class representatives (on behalf of themselves and the Global Health Claimant Class), Bethlehem (on behalf of itself and the Longshore Defendant Class), and the Director executed a Stipulation of Settlement dated as of December 5, 1994, reflecting a settlement of the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class ("the Longshore Settlement"). Lockwood Aff. at ¶ 10. The Longshore Settlement, if approved, will enable to Court to enter the LHWCA-related judgment provision set forth in the Global Approval Judgment described above. Lockwood Aff. at ¶ 18.

409. Because of the importance of securing a binding determination by this Court of the impact of the Global Settlement on the respective rights under LHWCA of the members of the Global Health Claimant Class and the members of the Longshore Defendant Class, Plaintiffs' Counsel intended -- in the absence of a settlement -to litigate to a final judgment the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class. Lockwood Aff. at ¶ 21.

410. By the time the Longshore Settlement was concluded, Plaintiffs' Counsel had been considering the issues presented for more than one year, first in connection with the negotiation of the Global Settlement Agreement, and

thereafter in connection with the intervention motions filed by the Director and the Dearborn Intervenors. In addition, Plaintiffs' Counsel were aware of and closely followed the litigation of similar LHWCA issues in the Georgine class action. Finally, during the four months of negotiations that resulted in the Longshore Settlement, Plaintiffs' Counsel performed additional research into LHWCA issues and had extensive discussion concerning those issues with counsel for other parties to the Longshore Settlement and the Global Settlement. Lockwood Aff. at ¶ 22. Likewise, counsel for Bethlehem were fully familiar with workers' compensation law generally, and LHWCA in particular, as well as the provisions of the Global Settlement. Bauman Aff. at ¶¶ 1, 6.

411. Counsel for the parties to the Longshore Settlement were thus fully informed about the LHWCA issues raised in the Amended Complaint, and the Longshore Settlement reflects the parties' informed evaluation of the respective merits of their legal positions with respect to those issues. Although Plaintiffs' Counsel were confident that they would prevail in the event the LHWCA issues were litigated to judgment, they also knew that such litigation could delay obtaining Global Approval Judgment and complicate the process of obtaining approval of the Global Settlement. Lockwood Aff. at ¶ 23. Counsel for Bethlehem concluded that there existed a substantial possibility that Bethlehem would lose a litigation concerning the LHWCA issues presented by the Amended Complaint. Bauman Aff. at ¶ 6.

412. On February 2, 1995, the Court conducted a hearing with respect to the Longshore Settlement. The Settling Parties offered the affidavits of Mr. Lockwood, as

representative counsel for the Global Health Claimant Class, Mr. Bauman, as counsel for the Longshore Defendant Class, and Katherine Kinsella (attesting to the completion of a notice plan with respect to the Longshore Settlement, see Findings of Fact ¶¶ 418-446). In addition, Messrs. Lockwood and Bauman spoke at the hearing concerning the benefits of the Longshore Settlement to their classes. Ronald Lupton, Esq., spoke providing his assent to the settlement on behalf of the Dearborn Intervenors, and Michael Hertzig, Esq., noted that the Director urged the Court to approve the settlement.

413. Only one objection to the Longshore Settlement has been filed with the Court, which consisted of a two-page perfunctory list of objections, along with the assertion that the objector was not a member of the Longshore Defendant Class. No member of either the Longshore Defendant Class or the Global Health Claimant Class appeared at the hearing to voice an objection.

414. Considering all the evidence before it, this Court finds that the Longshore Settlement -by removing a possible obstacle to the entry of a Global Approval Judgment - potentially makes available a guaranteed fund in excess of $1.5 billion to compensate members of the Global Health Claimant Class, persons who might otherwise recover little or nothing for their injuries, while also potentially reducing the net compensation obligations of the members of the Longshore Defendant Class to members of the Global Health Claimant Class. Lockwood Aff. at ¶ 18; Tr. at 2295-96.

415. The Longshore Settlement also protects the interests of the members of the Global Health Claimant Class

by insuring that the Global Settlement will not be determined at some future date to create a forfeiture of the LHWCA rights of such class members. Concurrently, the Longshore Settlement protects the rights of members of the Longshore Defendant Class to (i) obtain liens or credits; (ii) receive notice and an opportunity to approve settlements; and (iii) be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust. Lockwood Aff. at ¶ 19 and Exh. B (Stipulation of Settlement); Bauman Aff. at ¶ 6.

416. The Longshore Settlement does not improperly grant preferential treatment to class representatives or segments of the classes, and there are no differences that exist under the Longshore Settlement with respect to different segments of either the Global Health Claimant Class or the Longshore Defendant Class. Lockwood Aff. at ¶ 20 and Exh. B (Stipulation of Settlement).

417. Based upon the credible evidence, this Court finds that the Longshore Settlement was the product of serious, informed, non-collusive negotiations, and is fair, reasonable and adequate.

XV. ADEQUACY OF NOTICE

418. At the instance of the Settling Parties, notice to the classes in this action has been the most detailed and widespread notice of which this Court is aware.

419. The notice materials proposed by the Settling Parties included an extremely detailed "Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing"; an "Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action," designed to explain the notice in a more conversational manner; a newspaper notice advertisement for use in domestic newspapers; a newspaper notice advertisement for use in international newspapers; a notice advertisement to be published in Parade and USA Weekend; a notice advertisement to be published in American Association of Retired Persons Bulletin, Business Week and various trade, association and union publications; the script for a 30-second television notice advertisement; camera-ready materials for use in publications of unions and other organizations; a press release and announcement script for distribution to newspapers, television, radio and wire services; the script to be used by telephone operators when answering calls placed by potential class members to advertised toll-free telephone numbers; various cover letters to be sent with the notification materials; and various other materials. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 253 (June 28, 1994); Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing (Continental Exh. 28); Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action (Continental Exh. 30); Affidavit of Katherine Kinsella, sworn to July 12, 1994 (Continental Exh. 7). The Court has reviewed these materials and finds that the notice campaign accurately, clearly and -- in the case of the primary notice documents -- comprehensively, set forth all pertinent

information that class members would reasonably believe to be material in considering the proposed settlement of this class action.

420. The Settling Parties retained Katherine Kinsella to design and oversee implementation of a notice dissemination plan that would apprise class members of the settlement. Ms. Kinsella is the President of Kinsella Communications and a Senior Consultant to the Kamber Group, a large public relations and communications firm based in Washington, D.C. Tr. at 796-97. Ms. Kinsella specializes in marketing and advertising consultation. Tr. at 798.

421. For the past few years, Ms. Kinsella's primary work has been the design and implementation of class action notice plans -a field in which she has had extensive experience. She designed the national and Canadian notice plan pursuant to which notice was provided to asbestos health claimant and creditors classes in the Manville bankruptcy proceedings. Tr. at 797-98. She was similarly involved in the design and implementation of the national notice plan pursuant to which a class of future asbestos health claimants was provided notice in Georgine. Tr. at 798-99. This Court finds that Ms. Kinsella had more than ample qualifications to design and oversee the implementation of the notification plan in the instant action.

422. The proposed notice dissemination plan called for exhaustive efforts to provide notice to class members through a variety of methods. The Court finds that these efforts were reasonably designed to provide adequate notice to class members. These methods included:

--individual notice, by first class mail, to any potential Global Health Claimant Class member or Global Third-Party Claimant Class member whose name and address either was known or could be ascertained through reasonable efforts. This included any individual who identified himself or herself (or his or her organization) as a potential class member, either by calling one of two widely publicized toll-free "800" numbers (one of which is answered by Spanish-speaking operators) or by calling or writing to Global Health Claimant Class counsel or Global Third-Party Claimant Class counsel;

--notice targeted to numerous unions and other trade and labor organizations at the national, regional, state, and local levels, whose memberships might include members of the Global Health Claimant Class, or whose members might be able to assist in the notification effort;

--an extensive, multimillion dollar paid media campaign, utilizing two rounds of television advertising, including national network, cable and local television spots, newspaper advertisements, as well as advertisements in Parade, USA Weekend, American Association of Retired Persons Bulletin and Business Week;

--notice targeted to numerous professional, trade, industrial or legal publications whose

readership is likely to include either potential members of the Global Health Claimant Class or the Global Third-Party Claimant Class, or lawyers who routinely represent asbestos-related personal injury claimants or members of the Global Third-Party Claimant Class;

--an extensive free media campaign, including public service announcements concerning the proposed settlements via national wire services, national news radio stations, and in print, television and radio outlets in 151 media markets targeted for notification; and

--an international paid media campaign using print advertisements in approximately 40-50 international newspapers. Ahearn Class Action Notification Plan, Continental Exh. 9;

Tr. at 802-14.

423. The only objection related to the proposed notice or notice dissemination plan that was raised prior to the effectuation of that plan was voiced by the Ortiz Intervenors, who argued that it is inherently impossible to provide constitutionally adequate notice to class members who have no presently manifested injury.[38] The Ortiz Intervenors did

---

[38]The Flanagan Intervenors suggested, in one sentence and without explanation, that the notice itself was somehow incomplete. Brief of the Maritime Intervenors in Opposition to: Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the (continued...)

not, however, object to the specific contents of the proposed notice or the procedures provided for in the proposed notice dissemination plan submitted to the Court for review. Ortiz Intervenors' Objections to Settling Parties' Joint Motion for Preliminary Approval of the Settlement and Approval of Notice of the Settlement to the Class, Dkt. No. 278 (July 18, 1994), at 33-35.

On July 28, 1994, this Court held a hearing to consider the proposed notice and notice dissemination plan. Counsel for the Ortiz Intervenors, as well as counsel for other objectors, were present in the Courtroom. No objections to the proposed notice or notice dissemination plan were made. At the hearing the Settling Parties also submitted to the Court certain technical and typographical amendments to the notice materials. There was no objection to these amendments. Transcript of Hearing, Dkt. No. 325 (July 28, 1994).

425. On July 29, 1994, this Court issued an Order approving the form and substance of the Notice of Class Action Settlement and Third-Party Claimant Class Settlement and Hearing, as well as the related notification materials, for mailing and publication as set forth in the Ahearn Class Action

---

[38](...continued)
Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 280 (July 19, 1994), at 3. As found by this Court herein, however, the notice materials were complete and accurate. Findings of Fact ¶ 419. The Dearborn Intervenors also asserted an objection to the notice, but that objection was mooted by the filing on July 29, 1994 of the Amended Complaint in this action against Bethlehem and the subsequent Longshore Settlement. Memorandum in Support of Longshore Intervenors' Objection to Joint Motion for Approval of Notice to Classes, Dkt. No. 290 (July 22, 1994).

Notification Plan, as amended at the July 28 hearing. This Court determined that "[d]issemination of notice as set forth in such notification plan . . . constitutes the best notice practicable under the circumstances, when given will provide due and sufficient notice to all members of the Global Health Claimant Class . . . , [and] satisfies the requirements of due process and Fed. R. Civ. P. 23 . . . ." Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 2-3. Having now reviewed all of the evidence presented, this Court hereby reaffirms its previous findings regarding the notice materials and the notification plan, set forth in its July 29, 1994 Order.

426. In the same Order, this Court further ordered that the Settling Parties commence notification of the members of the Global Health Claimant Class and Global Third-Party Claimant Class pursuant to the notification plan by August 1, 1994, with notice dissemination to be completed within ninety days thereof. The Settling Parties were also ordered to submit to the Court a certificate describing and certifying their compliance with the July 29 Order no later than twenty days before the date of the final fairness hearing in this action. Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 3.

427. On October 31, 1994, this Court issued an Order in response to a motion submitted by James Fite, Executive Director of the White Lung Association, to extend the notification period to members of the Global Health Claimant Class until November 10, 1994. Order, Dkt. No. 394

(Oct. 31, 1994). The motion was made on the ground that more time was needed to provide notice to members of the White Lung Association. Motion of White Lung Association, Dkt. No. 393 (Oct. 25, 1994), at 1-2. The Order states, inter alia, that "[a]lthough the Court is of the opinion that notification as approved in this Court's order of July 29, 1994 is more than sufficient, the Court is willing to allow supplementary notice as requested with the understanding that the extension will not affect any other deadlines currently in force, including the November 15, 1994 deadline for objections by all non-intervenor objectors." Order, Dkt. No. 394 (Oct. 28, 1994), at 1.

428. In addition to calling Ms. Kinsella as a live witness at the fairness hearing in this action, Tr. at 796-835, the Settling Parties submitted three reports to the Court, in the form of affidavits of Ms. Kinsella, describing the implementation of the notification plan. Affidavit of Katherine Kinsella, sworn to October 13, 1994 (Continental Exh. 11); Affidavit of Katherine Kinsella, sworn to November 21, 1994 (Continental Exh. 12); Affidavit of Katherine Kinsella, sworn to February 14, 1995 ("Third Kinsella Aff.").

429. The second of the three reports was submitted pursuant to the provision of the Court's July 29 Order requiring the Settling Parties to describe to the Court -- no later than twenty days before the final fairness hearing -- their efforts to comply with the provision of the July 29 Order directing that the notification plan be implemented. Also pursuant to the July 29 Order, the second report was accompanied by a "Certificate of Compliance with Orders Approving Notice to the Classes," certifying, inter alia, that the Settling Parties had in fact

complied with the July 29 Order. Certificate of Compliance with Orders Approving Notice to the Classes (Continental Exh. 13). The third report supplemented the second report, providing the Court with additional information concerning implementation of the notification plan.

430. As set forth in the second of the reports submitted by the Settling Parties (Continental Exh. 12), as of November 16, 1994:

> --notice packages containing a cover letter, the notice document, and the "Overview and Question and Answer" document had been mailed to 520,998 individuals who had requested such package by calling the toll-free telephone number, 589,845 individuals who were sent notice packages in the Georgine class action or who opted out of that action, and 171,669 individuals who worked at locations where Fibreboard asbestos was alleged to have been used;
>
> --notice packages were also sent to tens of thousands of unions, organizations, employers, hospitals, courts, lawyers, insurance companies, and other entities and individuals in the United States and abroad, that either requested such packages or that had been identified as being a potential class member or as having a relationship with potential class members; and

--a 7" by 10" notice advertisement was mailed to 401,437 veterans and to 1,382,189 union members. See also Tr. at 812-13.

431. The Settling Parties conducted an unprecedented paid media campaign to provide notice to class members. Television advertising, consisting of a 30-second notice advertisement, was conducted in two stages. The first stage consisted of 160 televised advertisements shown on national broadcast and cable networks in the United States from August 22, 1994 to September 18, 1994. In addition, 46 advertisements were shown on Spanish-language television networks in the United States from August 22, 1994 to August 31, 1994. The second stage of televised advertisements consisted of 2,859 advertisements in 72 media markets chosen for the likely concentration of class members in those areas between September 19, 1994 and October 2, 1994. Third Kinsella Aff. at ¶ 10.

432. The Court-appointed English-language newspaper notice advertisement was published in 286 newspapers in 151 markets primarily on August 28, 1994. Tr. at 806. In a second round of newspaper advertising, the notice advertisement was published in 171 newspapers in the same 72 specially selected media markets that were used in the second round of television advertisements. Newspaper advertisements were also published in 29 Spanish-language newspapers between August 22, 1994 and September 1, 1994. Continental Exh. 12; Tr. at 806-07. In addition, the newspaper notice was translated into ten foreign languages and was published in 57 newspapers in 21 foreign countries. Third Kinsella Aff. at ¶ 8.

433. Court-approved notice materials were also published in USA Weekend, Parade Magazine, American Association of Retired Persons Bulletin, and numerous union and trade publications. Continental Exh. 12; Tr. at 808. USA Weekend and Parade have a combined circulation of approximately 100 million people. The American Association of Retired Persons Bulletin reaches 22 million people. Tr. at 808. The labor publications have a total circulation of over 2 million people. Tr. at 809.

434. The notice campaign also focused on specifically providing notice to members of the Global Third-Party Claimant Class. For example, notice packages were directly mailed to all entities that had been co-defendants in litigation with Fibreboard, to approximately 6,500 companies involved in shipbuilding, oil and gas refining and exploration, and to thousands of insurance carriers. Tr. at 811-12. In addition, notice advertisements were published in The Wall Street Journal, Business Week and numerous business and trade journals designed to reach members of the Global Third-Party Claimant Class. Tr. at 808-10.

435. The notice dissemination plan carried out in this action cost between $18 million and $20 million, and was the most expensive paid notice campaign ever conducted in the United States. Tr. at 814, 815. The notification plan in this action was more extensive than that approved and conducted in the Manville bankruptcy proceedings and in the Georgine class action. Tr. at 814-15. Ms. Kinsella estimated, for example, that the televised notices alone reached approximately 94.2% of television households in the United States an average of 5.1

times each.[39] Tr. at 80405. In total, more than 1.4 million notice packages were distributed. Tr. at 814.

436. This Court incorporates herein as reliable the reports submitted to the Court by the Settling Parties regarding implementation of the notification plan. The Court likewise finds the testimony of Ms. Kinsella to be credible and reliable. No objector or any other person or party has presented any credible rebuttal to the Settling Parties' evidence regarding implementation of the notice dissemination plan.

437. None of the formal objections to the settlements herein that were filed by the Ortiz Intervenors and the Flanagan Intervenors related to the adequacy of the notice or the notice dissemination plan. Ortiz Intervenors' Objections to the Proposed Settlement, Dkt. No. 396 (Oct. 31, 1994); Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994); Objections to the Proposed Global Settlement by the Maritime Intervenors, Dkt. No. 395 (Oct. 31, 1994).

438. Several individuals filed objections that related to the notice of the notice dissemination plan. Timothy P. Dowling asserted that the notice document is deficient on the grounds that it: (i) does not express the likelihood that the insurers will prevail in the Coverage Case appeal in terms of a percentage; (ii) does not indicate the amount of the fees that will be actually paid by the insurers to counsel for the Global Health Claimant Class, nor the number of hours devoted to this matter by such counsel; and (iii) does not adequately explain the nature

---

[39] 98.2% of households in the United States have televisions. Tr. at 805.

of the claims and expenses that may be paid from the settlement funds. Objection of Timothy P. Dowling to Global Class Settlement, Dkt. No. 419 (Nov. 10, 1994), at 4-6. This Court finds Mr. Dowlings' objections to be without merit because: (i) there is no need, and it would be inappropriate, for this Court to approve a notice that speculated upon the probable outcome of contested litigation in another court; (ii) fees to be paid to Plaintiffs' Counsel have not yet been determined and hence could not be set forth in the notice; and (iii) the notice accurately and adequately describes the claims and expenses payable from the settlement funds.

439. Mark E. Nelson, on behalf of himself and his minor son, asserted three complaints with regard to the notice dissemination efforts: (i) Mr. Nelson experienced some difficulty in obtaining copies of the Global Settlement Agreement, Third-Party Claimant Class Settlement Agreement and Trilateral Settlement Agreement; (ii) allegedly inadequate efforts were made to provide notice to security guards; and (iii) notice packages, including copies of the settlement agreements, should have been sent to "every residence in every country where Fibreboard asbestos has been distributed." Amended Objections and Petition to Intervene, Dkt. NO. 516 (Dec. 1, 1994), at 2-3. This Court finds Mr. Nelson's complaints do not warrant disapproval of the settlement because: (i) Mr. Nelson in fact received the notice materials; (ii) adequate efforts were made to provide notice to security guards, and security guards are not in a materially different position from other Global Health Claimant Class members with respect to their ability to receive notice; and (iii) it would have been impractical and unnecessarily costly to send copies of the notice materials to

every residence in the numerous countries where Fibreboard asbestos may have been present.

440. Finally, Charles Linder Floyd appears to object on the ground that the notice was provided through the "White controlled media." Motion to Intervene, Dkt. No. 390 (Oct 4, 1994), at 2. Mr. Floyd's objection assumes that persons other than white persons -- and, in particular African-Americans -- did not receive adequate notice through the means described in Ms. Kinsella's affidavits and her testimony. Because there is no support for such an assumption, this Court rejects Mr. Floyd's objection.

441. On December 21, 1994, the Settling Parties moved this Court for approval of a supplemental notice entitled "Supplemental Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing" (the "Supplemental Notice"), containing a description of the Longshore Settlement, a clarification of the operation of the Global Settlement class definitions, and a description of certain amendments to the Global Settlement Agreement and related documents. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Supplemental Notice. Joint Motion of the Settling Parties for Approval of Supplemental Notice and Notification Plan, Dkt. No. 581 (Dec. 21, 1994). On December 22, 1994, this Court approved the Supplemental Notice and the plan for its dissemination. Order Approving Supplmental Notice and Notification Plan, Dkt. No. 583 (Dec. 22, 1994).

442. Pursuant to the notification plan, the Supplemental Notice was mailed to all potential members of the Global Health Claimant Class and Global Third-Party Claimant Class who were directly mailed the original Notice of Class Action, Global Settlement, Third-Party Claimant Class Settlement and Hearing. In addition, the Supplemental Notice was mailed to all organizations that are not Global Third-Party Claimant Class members that were directly sent the original notice document. In total, 1,513,018 copies of the Supplemental Notice were mailed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al., v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

443. The Settling Parties also moved this Court on December 21, 1994 for approval of a separate notice entitled "Notice of Class Action, Settlement and Hearing" (the "Longshore Notice"), containing a detailed description of the Longshore Settlement. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Longshore Notice. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlement, for Approval of Notice to the Class and for Scheduling of Final Fairness Hearing, Dkt. No. 578 (Dec. 21, 1994). On December 22, 1994, this Court approved the Longshore Notice and the plan for its dissemination. Order Preliminarily Approving Class Action Settlement, Approving Notice to the Class and Scheduling a Final Fairness Hearing, Dkt. No. 584 (Dec. 22, 1994).

444. Pursuant to the notification plan, 11,263 copies of the Longshore Notice, together with the Longshore Stipulation of Settlement, were mailed to potential members of the Longshore Defendant Class who had previously been identified and to whom the Global Settlement notice package was sent. In addition, efforts were made to identify other members of the Longshore Defendant Class. As a result of these efforts, 12,280 copies of the Longshore Notice and Longshore Stipulation of Settlement, together with the Global Settlement notice package, were distributed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al. v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

445. On February 2, 1995, at the hearing upon the Longshore Settlement in this Court, the Director suggested that the Longshore Defendant Class definition be clarified to apply specifically as well to Longshore employers that provided benefits under so-called "LHWCA Extensions" -- federal statutes that incorporate and apply LHWCA's provisions to certain other categories of employees.[40] In response to the Director's suggestion, the parties both clarified the definition and distributed a second round of notice to all 23,000 entities who previously were provided notice of the Longshore

---

[40]The "LHWCA Extensions" are the Defense Base Act, 42 U.S.C. §§ 1651, et seq., the District of Columbia Workmen's Compensation Act, 26 D.C. Code §§ 501, et seq., the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, et seq., and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 171, et seq.

Settlement. Affidavit of Peter Van N. Lockwood, sworn to February 8, 1995, at ¶¶ 3, 7.

446. In sum, this Court finds that the notice materials used in this class action, and the dissemination thereof, were more than sufficient to supply to factual predicate necessary to comply with the requirements of Fed. R. Div. P. 23 and due process. The evidence in the record amply demonstrates that extensive and massive notice of this class action and the proposed settlement was given to class members.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting By Designation